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NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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01-CV-00715-JCC

Cal Coburn Brown, *petitioner*,

v.

John Lambert, *respondent*.

06/13/2001 – Petition for a writ of habeas corpus filed

06/19/2001 – Order granting stay of execution

11/30/2001 – State court record filed

02/01/2002 – Supplement to state court record filed

07/15/2002 – Amended petition for a writ of habeas corpus filed

09/13/2002 – Answer to amended petition filed

09/16/2004 – Judgment and Order of U.S. District Court denying habeas corpus petition

09/22/2004 – Notice of appeal filed by Brown

11/05/2004 – Order granting in part certificate of appealability

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

04-35998

Cal Coburn Brown, *appellant*,

v.

John Lambert, *appellee*.

12/08/2005 – Opinion of Ninth Circuit, reversing in part, and granting petition for a writ of habeas corpus as to sentence of death

12/20/2005 – Petition for rehearing *en banc*

06/19/2006 – Order and Amended Opinion of Ninth Circuit, denying petition for rehearing *en banc*; dissent from denial of rehearing *en banc*

06/27/2006 – Order staying issuance of the mandate pending the filing of a petition for a writ of certiorari

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

OCTOBER 28, 1993

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THE COURT: All right. Counsel, this is an area where there is great concern from my aspect. The voir dire process, even in a capital case, is within the discretion of the Court. Certainly in a case like this where there is so much at stake, I am willing to give counsel as much opportunity as possible to ask questions of the prospective jurors so you can intelligently use your peremptory challenges and find those challenges for cause.

If any of you have ever tried a case in a Federal courtroom, you wouldn't be asking any questions. They'd all be done from here, and I think that process can actually be done from here too in

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state court and still withhold any appellate scrutiny.

The questions that were asked yesterday from both sides were way beyond what should be allowed in any particular case. You cannot ask questions of the jurors that would get them to commit in any way. You cannot ask questions of them that would indicate, as we have already discussed, you know, "Do you understand this would mean die in prison," because that's not technically correct.

You cannot ask them, "What do you think would be appropriate mitigating factors?" You can ask them if they would be willing to consider mitigating factors and perhaps point some of them out. Some of those things that you saw yesterday was a perfect example. A lot of these people, most of them are working in a total vacuum. There were some great responses given by some of the jurors in terms of the death penalty. I forget the woman's name yesterday, but she kept saying that, you know, when this doesn't really touch your life, you don't think much of it, and that is the point that's being made by both sides.

That has to be explored with each individual juror, but when you ask them in that vacuum about

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something that doesn't touch their lives and you ask them to come up with specific instances where they would or would not do something, you're going to get the same exact response you got even with that intelligent juror yesterday, nothing, and that's not going to lead to any kind of information that either side can use from this particular juror or this particular panel as to what they might ultimately do.

The real issue here is to seat a jury that is comprised of individuals who can follow the law, consider all factors before making up their minds, and certainly that has to be done within the context of this particular case, within the context of the facts of this case.

The questions that are to be asked of them are to be designed to discover whether individual jurors would automatically impose either one penalty or another and certainly have some leeway to follow up on that and put it in a context that they can understand that makes sense from what you know of the facts of this particular case. But to sit there and flesh it all out and ask them, "Well, if you found one aggravating circumstance, would that change your opinion? How about if two? How about if three? How about if four? How about if five?" And are not only

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improper, but a total waste of time.

I think if you can talk about extremes, you can ask them, think of the most extreme case you could think of, would you say that in that particular case, in a Ted Bundy or Jeffrey Dahmer or something like that, would you just automatically impose -- would you not even consider this other option? That's what these sorts of questions are designed to do, and then place the facts of this case within that particular context.

Counsel, we gave an assurance, in effect, to the jury panel that was called here that this case would take about six weeks. We are looking at a timeframe where that will put us very, very close to

the Christmas holidays and the Christmas breaks and stuff. A lot of these people that have indicated they can stay may very well have problems if we go seven weeks, seven and a half weeks.

At the speed that we're going, if counsel insist on going into it in this particular depth, it is going to take us three and a half weeks for jury selection, period. We are not going to be able to get the case done in time.

Yesterday was a trial, a shakedown. I saw what it was like. Today I'm expecting you to move a lot

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faster. I think 15 to 20 minutes is more than necessary for both sides to be able to explore, absent some unusual response from a particular juror. I'm going to allow you some leeway today, both sides. I want you to consider the Court's comments. You all know exactly how to do it in this particular arena, and I understand that it may be new in terms of dealing with these kinds of issues with a lot of these jurors and that that will take some time, but if we are as slow as we were yesterday in dealing with some of these people, then tomorrow the Court is going to handle it differently and I'm going to do a major portion of the voir dire and allow counsel a very limited time to follow up on any specific responses the jurors may have, because that's the only way I can think of keeping this whole thing on time.

MR. CLEVEN: Your Honor, at least one matter I'd like to bring up. The Court's remarks seem to be calculated or addressed only to people

who would automatically impose one penalty or another I believe was what the Court just said. It is our position of course that that is a correct statement of the death qualification process.

It is our position that Witt has not been fully

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incorporated as a matter of state law and that Witherspoon is the only mandatory test. However, in the reverse aspect, Morgan does impose an Eighth Amendment requirement on these proceedings, and Morgan does adopt a reverse Witt and calls for the exclusion for cause of jurors who would be substantially impaired in their ability to consider the alternative sentence of life.

The Court's remarks just now are the closest thing we've heard to a ruling in this regard, and I think all parties would be interested to know what the Court's position is in those regards. Are we entitled to challenges for cause of jurors who would be substantially impaired in either regard, death qualification or life qualification, or is the Court limiting this to all jurors?

THE COURT: Counsel, the dialogue that took place with Ms. Bohinski yesterday I believe, the one juror who was excused for cause, is probably the best example I could think of as a juror who was substantially impaired in being able to consider those options one way or the other. She in answer to questions from both sides vacillated back and forth. I was satisfied there was a substantial impairment there and made the decision to go ahead and excuse

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her.

The direct response to your question is certainly you can look to questions that are designed to bring up whether one would automatically impose one or the other or not consider one or the other, attitudes, biases, prejudices, thoughts that would substantially impair them from going one way or another. I'm just trying to limit it.

MR. CLEVEN: So it is the Court's ruling as well then that the State is entitled to exclude pursuant to Witt in addition to excluding pursuant to Witherspoon?

THE COURT: Does the State have a position?

MS. FRICKE: Yes, your Honor. I think that counsel is overlooking State vs. Hughes where the Washington Supreme Court citing to Witt applied the substantial impairment test.

Also the Court should consider that counsel hasn't made any kind of motion under the State vs. Hughes case to try and get this Court to somehow deviate from Hughes, and this Court should follow the law that has been set out from the United States Supreme Court and the Washington Supreme Court and use the substantial impairment test on both sides of the coin.

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THE COURT: That is my understanding, counsel, and that's the way this Court has been proceeding all along.

MR. CLEVEN: We had briefed it otherwise, your Honor, and it is our position that Hughes did not serve to adopt Witt. It made reference to Witt,

but it was not clearly an application of the Witt standard.

It is our position that that has not been squarely faced by any Court in this state as of yet, and of course the United States Supreme Court decisions in Witherspoon and Witt are not mandatory. They are merely permissive. They permit the states to allow certain sorts of excuses for cause. They do not require them in any instance.

THE COURT: Counsel, my objective is to get a jury seated here that would be willing to consider both options equally and fairly. If that means that the State can make a motion to excuse someone for cause because they would be substantially impaired from imposing the death penalty, this Court will certainly consider that in looking at whether or not to excuse a particular individual, but I think the only fair way to do it from my reading of the law is to allow both sides to be able to make those

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particular challenges for cause and the Court can make specific rulings.

Are we ready for our first juror?

MR. MATTHEWS: Yes, your Honor.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 1, 1993

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THE COURT: Mr. Osborn, as I told all of you this morning, the attorneys have thier first opportunity to follow up on some of the questions. Some of these questions that are asked are convoluted and are difficult to answer at best even when grammatically correct. Please do your best. If you do not understand the question, ask them to clarify it, ask them to restate it perhaps in a different way. There are no right or wrong answers. All we are trying to do is ascertain a little bit about you, your background, your feelings about some of these issues that counsel are going to discuss.

All right. The State.

VOIR DIRE EXAMINATION

BY MS. FRICKE:

Q Good morning, Mr. Osborn. I am Theresa Fricke, and I am one of the prosecutors in this case.

First, I'd like to go back a few days and sort of try and recall with you some of the instructions that Judge Martinez gave to the jury when you first were here a few days ago. I

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just want to make sure that the legal sort of framework is in place when discussing the death penalty as a possible penalty.

First, do you understand from the Judge's previous instructions that the defendant is charged with a premeditated murder?

A Yes.

Q And that in addition to the charge of premeditate murder, there are certain aggravating factors that are also charged. Do you understand that?

A Yes.

Q Okay. So, the State in proving the case to the jury would be required to prove a premeditated murder and also at least one of those aggravating factors. Do you understand that?

A Yes.

Q And was it also clear that there may be a second phase of the case, in other words, this case could have essentially two prongs?

A Yes.

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Q Now, in the second phase of the case, the jury would be looking at punishment only. Did you understand that?

A Yes.

Q Now, the other thing that the Judge explained was that the State would be required to prove the crime, the aggravating factors and, if we got to a penalty phase, we would have to prove to you that a death sentence is the appropriate sentence beyond a reasonable doubt, in other words, that standard of proof goes throughout the entire case. Do you understand that?

A (Nodding head).

Q The other thing that goes throughout the entire case is a presumption of in favor of the defendant. In the first phase of the case, the part where you are looking at premeditated murder and the aggravating factors, the defendant is presumed innocent. Do you understood that from the instructions?

A (Nodding head).

Q In the penalty phase if we got to the penalty phase in this case, there is the presumption of leniency, in other words, the jury would presume that a life without parole sentence should be imposed unless the State proves

otherwise to you beyond a reasonable doubt. Do you understand that?

A Yes.

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Q Now, the first question I have for you is, when you heard about this case on the very first day here in court a few days ago and the Judge mentioned that it could possible be a death penalty case, what was your reaction?

A My reaction was that I would have to look at everything very carefully to make a decision on something like this.

Q Did you have any particular concerns about your own feelings about the death penalty?

A No.

Q Have you thought about it since that day?

A Yes.

Q Can you share with us some of your thoughts about the death penalty?

A Well, I think it's permanent.

Q Pardon me?

A I think it is permanent, but I wouldn't, I really am ambiguous on that. It depends on the circumstances and what the crime was. There's a lot of factors that have to be taken into consideration.

Q I think that you mentioned when the Judge asked earlier that you had heard something about this case in the press?

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A Yes, sometime back I had read in the paper where they had found a body in the trunk of a car at SeaTac, and that was all that I remember about it. I didn't remember anything else except they were looking for someone that they thought left from the airport. And then a couple of weeks back I read in the paper, or I actually heard it on the radio that they were impaneling a jury for this case. I thought, well, I don't have to be down there until the 27th so I will not be involved in that, but here I am. That's my only recollections of this case.

Q Now, the media reports, did those have any influence on you? Do think that is something that would interfere with your ability to hear this case?

A No, I didn't read, I just read the fact that they were, there had been a body found out at SeaTac. And I also heard on the radio that they were impaneling a jury. I didn't associate those two because that was quite sometime back when they found the body. It wasn't current news.

Q Do you think that you could separate what you heard in the newspapers or radio or television

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and separate that from your thinking about this case and you would be able to just concentrate on what you are hearing in court?

A Yes.

Q Thanks.

We talked a little bit about the State's burden of proving the case beyond a reasonable doubt.

Now, the fact that there is potentially a penalty phase and potentially a death sentence decision that has to be made by the jury, do you think that you would hold the State to a higher burden of proof as would prove the guilt phase of the case? In other words, knowing that you might have to decide on yes or no on the death penalty, do you think you might hold us to a higher standard in the part of the case where you just determine guilt or innocence?

A Yes, I probably would. You would have to really prove it.

Q Okay. Now, the proof beyond a reasonable doubt is a standard that sometimes folks are not real familiar with until they are part of a jury. Sometimes I hear people say, well, I want proof

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beyond any doubt, any doubt whatsoever. Is that what you are talking about?

A Yes.

Q You would expect us to prove the case beyond any doubt?

A (Nodding head).

Q Let me ask you then also in the penalty phase of this case, if we did prove to you beyond a

reasonable doubt and the jury decided that this man was guilty of murder in the first degree, premeditated, and at least one aggravating factors, and then you found yourself in the penalty phase of the case, would you hold the State to a higher burden in that phase of the case as well?

A Not if he had been found guilty.

Q In the penalty phase, do you think that the fact the a death sentence is possible that that would cause you to have concern about your ability to be fair and hear both sides of the case?

A No.

Q I'd like to show you the jury instruction that comes about with the penalty phase where the jurors have in mind the crime of which the defendant has already been convicted.

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Now, the jury considers mitigating factors that could come up at any time during trial. Whatever mitigating factors are present, the jury considers those and decides whether the State has proved beyond a reasonable doubt that there are not sufficient mitigating factors to merit leniency.

Would you be able to make that determination and be able to consider mitigating factors?

A I believe so.

Q Just to clarify one thing, in the penalty phase when we are talking about the mitigating factors, again, the State first must prove in the penalty phase is beyond a reasonable doubt just like it is in the guilty phase. Would you hold the State to prove beyond all doubt that there are not sufficient mitigating factors to merit leniency, or would you use the beyond a reasonable doubt standard?

A Reasonable doubt.

Q So, you would think that the standard might be not as great in your mind in the penalty phase as it was in the guilt phase?

A Yes.

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Q Why is that?

A Well, if he had been found guilty and it is murder in the first degree, there would be no question in my mind to find him guilty for the penalty.

Q And then you could explain why that would be a different decision making in the guilt phase, why you would feel you would need more proof in the guilt phase?

A I don't believe I said that.

Q Oh, okay. Maybe then you could clarify that for me?

A Well, it is just like if the party has been found guilty of murder in the first degree, there would be no problem finding him, going for the death penalty.

Q And in that situation you would be able to hold the State to its burden of proof beyond a reasonable doubt.

A Yes.

Q And then when we were discussing the guilt phase of the case, when I was talking about beyond a reasonable doubt standard, perhaps I misunderstood. I thought that what you told me was at that point you wanted to have the State

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prove beyond all doubt?

A Beyond a reasonable doubt.

Q Okay. Do you believe then that you could follow the law in the guilt phase of the case?

A Yes.

Q And hold the State to its burden beyond a reasonable doubt?

A Yes.

Q So, would you then be influenced by the fact that there is a potential death penalty?

A No.

Q Thank you, sir.

MS. FRICKE: No further questions, Judge.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good morning. My name is Lin-Marie Hupp. I am one of Mr. Brown's attorneys. I am going to ask you a few more questions about this. Usually one of the first things I'd like to know is, is it confusing to you at all, the fact that we're asking about what you would do in the possible sentencing phase before we have even started the trial and you haven't heard any evidence at all?

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A I can see where you're headed.

Q So, we end up asking all these questions about what if you found him guilty and you understand why we're doing that?

A Yes.

Q And I guess before I ask you about your feelings about the death penalty, I just want to ask you a couple more follow-up questions about what you did hear.

What you remember, what I'm hearing is what you remember is an article that you read in the paper a really long time ago and then you heard something on the radio like within the last month or so?

A Yes.

Q I think, well --

A And I don't even remember any names --.

Q Okay?

A -- in this. I just remember that there was a body found in a trunk of a car at the airport,

and the police were looking for someone who had done it. Names, I don't remember. I also don't remember the name on, when I heard it on the radio the other day that they were selecting a jury.

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Q And you are sure that it was this case. Is that partly because it was a death penalty case?

A No, no. I had no idea it was this, if they were even, if they had captured the person that they were looking for.

Q I notice in your questionaire that you had taken the time to write in a letter to a magazine when they had made errors in their articles, I mean, you mentioned that you had done that with like aircraft magazines?

A Yes. I was in the aircraft business all my life. They call it nit-picking.

Q You wouldn't be surprise to hear that sometimes the news, the radio or the newspapers get details wrong?

A I don't believe anything I read in print in the newspaper.

Q You could be able to put aside anything, you say you remember the detail in the paper, you would be able to put it aside and decide basically on what you have heard in court?

A Well, let's talk about this. The letters I have written to aircraft magazines, they show a picture of an airplane sitting there and the caption is not for that aircraft. I would write

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to them and say get your proof readers on the stick here.

Q Okay. And you wouldn't be shocked to heard sometimes that happens with crime stories in our local press?

A Oh, yes, I have no doubt.

Q Okay. Now, I am going to start talking about the death penalty. One of the things that you said, I think, and correct me if I'm wrong, is that if somebody has been proved and you are really sure that they're guilty of murder in the first degree, that the death penalty would be an appropriate penalty?

A Would be an appropriate penalty, yes.

Q First, I have got a couple of questions about that. First of all, what does murder in the first degree mean to you? We have a lot of stuff that we've talked about as to what that means.

A To me it means something that was premeditated, planned this, they had entered into a program to deliberately take this person's life.

Q Okay. And in that case, the death penalty would be a more appropriate penalty in your own personal opinion. Do you have any of sort

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feeling that there is no other appropriate penalty for it?

A Not to premeditated.

Q How about this case involves, we don't even get to the question I'm talking about, the possible death penalty, unless we decide premeditated murder yet the State also proves beyond a reasonable doubt at least one of four aggravators that they charged. They are going to present evidence and try and convince you beyond a reasonable doubt that this murder was committed during a rape, a robbery, a kidnapping and in order to eliminate a witness.

First of all, do you understand generally what that charge is? Do you have any questions about what the charge is?

A Well, you just explained what the charge was.

Q Sometimes I don't know if I'm making sense or not, and I have been going over this often enough that sometimes I mix things up. Does that make sense?

A Yes.

Q Before you get to a penalty phase, before you get to the point where the jury is going to decide on the death penalty, the jury has to be

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convinced beyond a reasonable doubt of premeditated murder and at least one or maybe all of those aggravating circumstances?

A Yes.

Q In that circumstance, if you were sitting on a jury and you found beyond a reasonable doubt

that a person committed premeditated murder and that it was committed either during a rape, a robbery, a kidnapping or in order to eliminate a witness, then do you think there is any penalty other than the death penalty that's appropriate?

A No.

Q Why is it that you feel that way?

A I guess it's the way I was brought up, and eye for an eye, a tooth for a tooth.

Q And I want to reassure you that there is no right or wrong answers here. What we're asking for is what your giving us, is honesty about your moral feelings.

And eye for an eye, a tooth for a tooth, and that is in the case where there is premeditated murder and at least one of the aggravating circumstances?

A Yes.

Q In that circumstance, do you think that you

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could seriously consider any penalty other than the death penalty?

A No.

Q Do you think that you would be open to listening to any kind of arguments that are against the dealth penalty?

A Listen to the arguments.

Q You would listen to the arguments, but in reality you think you would be for the death penalty all the way?

A If the person was found guilty.

Q Okay. And part of what I was hearing from the start of your, from when you were talking to Ms. Fricke was, even if you found beyond a reasonable doubt that you might not impose the death penalty if you had some sort of lingering doubt as to the person's guilt?

A If I have that doubt, yes.

Q But that is the only kind of thing in that instance that would stop you from imposing the death penalty; is that right?

A (Nodding head).

Q That's right? I'm sorry.

A Yes.

MS. HUPP: I don't have any further

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questions.

THE COURT: Mr. Osborn, I will have you step back in the juryroom. The bailiff should be able to excuse you from there in a few minutes. We will tell you whether we get ahold of you in the future and how we go about that. Thank you for your responses.

(Prospective juror left the courtroom.)

THE COURT: Actually, I think he evened it out by making you prove it, really, really prove it and then we he would not consider anything else, right?

MS. HUPP: I think we will count him out on a number of different bases, your Honor.

THE COURT: Challenges?

MS. HUPP: From the defense, definitely.

MR. FRICKE: Your Honor, I think this jury reversed himself twice. I really didn't draw a conclusion based on what this person said.

MR. MULLIGAN: Your Honor, I think he only reversed himself when he was let out and was really clear of what his own feelings are,

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an eye for an eye, a tooth for a tooth, there wouldn't be any other appropriate penalty and that was the way he was raised.

MS. HUPP: And I also think he was very clear in distinguishing between just premeditated murder and then when we talked about aggravating circumstances, he was willing to think about another sentence if it was just premeditated murder, but in addition had decided the person was guilty beyond a reasonable doubt of also an aggravating circumstances, then there really was not an alternate.

MR. FRICKE: I don't think I heard that just because I explained all that to him incredibly carefully in the beginning. I think the only way to clear it up is if the Court would make the inquiry. I think he was just being kind of trying to please both sides or something because he just reversed himself like a whipsaw. I think maybe if the Judge would ask him questions, maybe we could clear this up.

MR. MULLIGAN: Your honor, when the question is his own views substantially impares the ability to consider the sentence of life, when he is not being asked questions when he

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said very directly that if it is premeditated murder with an aggravating circumstance, it would be the death penalty, and then he goes to the eye for an eye, a tooth for a tooth in response to a defense question, it's had for me to imagine how you could think he was trying to please us by saying that.

THE COURT: And then when he said it was just the way I was raised, I mean, it seems to imply that his feelings are fairly well set.

Counsel, I'm going to go head and excuse Mr. Osborn. Let met point something out to both sides. If you are going to agree on a challenge, then there is no, we can shortcut some of what happens out here. If there really is a serious question about whether or not someone is confused about what is happening out here, I don't mind at all stepping in and trying to clarify it from my prospective and giving them perhaps a bit more instruction and asking for responses.

I thought at first the both of you were wanting to excuse Mr. Osborn since he seemed kind of confused to both sides, but if there really is a question, let me know and I

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don't have any hesitation about bringing the juror out here and following up questions done by the court.

MR. MATTHEWS: Quite honestly, in this case, your Honor, I don't think either one of us felt so strongly about excusing him for what he said about the guilt phase. The standard of proof didn't worry us. I did feel he was a little confused. He did go back and forth. So, if you want to excuse this person, that would be fine. How do we telegraph the Court that we would like the Court to ask some questions?

THE COURT: I don't mind sending him back there and, actually, if either one of you, either side wants to say would the Court care to clarify or ask questions, I will jump right in there.

What I was thinking of watching the last three people or so, is there has got to be a better way, there has got to be a different way to begin, maybe make it more visual. Think about it during the lunch hour. I have got my clerk thinking or working on the possibility here in terms of other ways of presenting it to them. Perhaps a chart could be put up on an

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esel, something that would show them in terms of phase one, phase two, presumption of innocence, presumption of leniency, that sort of thing so they could visualize it rather than just listening to the very difficult grammatically incorrect questions that are asked in this area. Think about it.

Bring out the next one. Tell Mr. Osborn the Court has excused him for cause, or just excused him. We don't need him back.

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(Prospective Juror, Victor A. Obeso, entered the courtroom.)

THE COURT: How are you?

MR. OBESO: Fine, thank you.

THE COURT: How do you pronounce your last name?

MR. OBESO: Obeso.

THE COURT: All right. Mr. Obeso, thank you for coming out here. I know it is late. Thank you for your patience. Counsel are going to follow up on some questions that they asked before. We'll start with the defense.

VOIR DIRE EXAMINATION

BY MR. MULLIGAN:

Q Good afternoon, sir. My name is Terry Mulligan. I have just got a few questions for you.

Could you tell me a little bit more about what all you remember reading or hearing

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about this case in the press?

A Not very much really. Essentially, the facts that the Judge told us earlier. I recall that there was a body discovered in a trunk at the SeaTac Airport. And I don't recall whether it was before that or after that, that alleged California. Very basic. I'm not sure if it's correct or not.

Q Do you remember any other specifics about Mr. Brown that may have been included in those articles or allegations about his past?

A I don't. I did recall his name very clearly the other day when I was here, which tells me I read the article. I don't recall.

Q And you sort of threw on there that you're not even sure if they are true. You understand that, particularly in sort of high profile cases like this, that what you read in the paper may not even be close to the true?

A I'm very clear on that, yes.

Q So, if you assure both sides, then, that whatever you read is not going to effect you even if during the course of the trial something comes up and jogs your memory about something else you read in the newspapers, you would be

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able to put that out of your mind?

A Yes, I would.

Q Do you consider, let me ask you this. When you heard the Judge, when you were in here the very first day, he mentioned the death penalty. What was the first thing that went through your mind?

A Well, my heart kind of sunk that it was a case in which the loss of life would have to be discussed, dealt with.

Q When you say your heart sunk because you knew as a juror that is the kind that you

might have to discuss and deal with, do you still think that, although, I'm sure that you may be tough but it's something you can handle?

A Yes, I believe I can handle it.

Q Would you consider yourself I guess a law abiding citizen for the most part?

A Yes, I do.

Q Would you get some instruction of the law from Judge Martinez and go back into the juryroom and just likely ignore that and, in essence, break the law?

A No, I would not.

Q Would your decision, and looking again at the chart that the Court has given you, do you

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understand that if the State proves beyond a reasonable doubt and all twelve jurors say Mr. Brown is guilty of premeditated murder with at least one aggravating factor, that that same jury is going to have to decide whether to impose a sentence of life without parole or the death penalty?

A Yes, I understand.

Q Do you think you could go into a juryroom and fairly consider both of those alternatives?

A Yes, I believe I could.

Q Do you think that there is any type of a case, whether in terms of a murder case, first degree murder with aggravating factor, do you

think there is any way your decision as to which penalty should be imposed would be automatic going either way? In one case you would say I'm am going to vote for the death penalty no matter what the law says, no matter what other evidence they give me, no matter what the other jurors say or vice versa, the life sentence?

A I don't believe I would do that in either case.

Q Are your feelings about the death penalty so strong that you wouldn't be able to give serious, very serious consideration to both of

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those alternatives? Are they so strong that you would lean so heavily against one or so heavily against the other that you couldn't give very serious consideration to both of them?

A I would give serious consideration to both based on the instructions.

MR. MULLIGAN: I have no further questions.

THE COURT: Thank you. State.

VOIR DIRE EXAMINATION

BY MS. FRICKE:

Q Good afternoon, Mr. Obeso. I'm Teresa Fricke. I'm one of the prosecutor's in the case. When you heard that this was going to potentially be a case where the death sentence would have to be decided upon, did you have a chance to reflect on your own feelings about the death penalty?

A Well, as I said, initially I had kind of a sinking in my heart feeling. I thought about it some more, and I filled out the questionaire.

Q Have you had a chance to think about it between the time you filled out the questionaire and today?

A Yes.

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Q What kind of things were going through your mind as far as any concerns you might have about deciding the death sentence?

A I don't know any place that this concerns, but just trying to fit what my views are, or if it's something I've given thought in the past but never had to consider in front of me. Obviously, this is a different situation. Just kind of rethink why.

Q Can you share with us a little bit about the things that went through your mind?

A Well, I believe I answered on the questionaire that I thought that the death penalty was poor public policy. I think that historically the harsher the penalty, it disproportionately has been applied to people of color. I believe that that's called the inherent bias to our system but I believe it's there. I don't, there are a number of different reasons for bias in society for the the death penalty, for a deterent, for retribution.

Q What do you think about those, do you agree with them?

A I don't know that I, I don't think that I believe that the taking of a life is justified.

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But I do believe in society agreeing as a whole as to what rules we live by. That would be one of our rules. We have a death penalty.

So, I don't think I thought through exactly what all my feelings were about it, but I do think it is there for a reason, and that if faced with having to make a decision about that law, that I would look at what the law is, what the instructions are about the law and apply those.

Q So, that you, however, don't think it is appropriate to take a life? Would you explain that a little further?

A Well, I guess I am not quite comfortable with society deciding that because someone has taken a life that, therefore, this society should take that person's life.

Q What do you think is your source? I'm sure there are other people that feel that way, but what is your personal reason for why you feel that way?

A If it's a member of society, it feels like I'm making part of that choice to take that life. If faced with it individually, I wouldn't do that.

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Q Is that something that during the course of your life you have always felt that way or has there been a time in your life when you felt the

death penalty was an appropriate punishment?

A I don't think I have given it a lot of thought over the course of my life. I don't recall when I was ever, felt the death penalty was the correct, right thing to do.

Q Now, in the event that there was a guilt verdict in this case and the jury came back and found the defendant guilty of murder in the first degree premeditating with one or more of the aggravating factors in the guilt phase and, so, then the jury finds itself deciding the penalty phase and whether the appropriate punishment is life without parole or the death penalty, would you have some concerns, some feelings of your own about whether you could vote for a death sentence?

A I believe that I could based upon what the law is, what instructions are given to me, what the facts are as I understand them to the jury. So, I feel that if I participated in a decision that the defendant was guilty, then I would then wait for my instructions on the penalty phase and

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make a determination not from preconceived notions.

Q Do you feel that in deciding the penalty that because of your personal feelings about the death penalty, do you think that you would have trouble being fair to the State's position in that phase of the case?

A I don't feel that I would have any trouble, no.

Q As far as the guilt phase of the case, going back to the part where we're talking about the guilt or innocence of the crime charged, murder in the first degree premeditated as well as the aggravating factor, the standard of proof that the State needs to convince the jury is beyond a reasonable doubt.

Now, given that we're dealing with the death sentence as a possible punishment in the penalty phase, do you think you would hold the State to a higher burden of proof, in other words, in the guilt phase of the case, would you want to know beyond all doubt that the defendant was guilty?

A No, I believe I could fairly decide reasonable doubt as reasonable as defined for me. Yes. A word can mean a lot of different things to a lot

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of different people.

Q Yes. And that is one of the reasons why I wanted to make this real clear is that if you do have some concerns about the death penalty as a punishment, whether that would cause you to expect more from the State in terms of proof, whether you would want beyond all doubt as opposed to beyond a reasonable doubt?

A No, I don't believe I would apply that standard.

Q Likewise for the penalty phase, again, the beyond a reasonable doubt standard is the one

that applies. Would you be able to follow that standard as well?

A Yes.

Q In the event that a death sentence was rendered in this case by the jury, would you have any trouble talking about that with anybody that you know afterwards, explaining what your position was?

A As of now I would say, no. After being through it I'm not certain what I would feel at that point ,but I believe I will be able to talk about it and would want to find people close to me to talk about it.

Q As far as the, again, the decision on whether to

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impose a death sentence, it's a lot different than us talking about it here and discussing it between counsel and the Court and with you here versus when you're actually in a situation however many days from now making the decision.

Do you think that there would be any concerns of a moral or personal nature that would hamper your ability to make that decision? I'm sorry to keep pressing you on this, but it is critical that the State get this fairly clear.

A No, I don't believe it would be.

MS. FRICKE: No further questions.

THE COURT: Mr. Obeso, let me have you step back into the juryroom, and the bailiff will excuse you in just a few minutes. Thank you.

Any challenge on Mr. Obeso?

MR. MATTHEWS: The only problem I had is at one point he said he didn't believe taking a life was justified, I think that was an exact quote, when he was taking about the death penalty itself. And because of that quote we would certainly argue that it certainly would make it extremely difficult for him to vote in favor of a death penalty. That he seemed to

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speak very strongly of moral convictions, and it would appear, I would certainly suggest to the Court, that it is going to be very difficult for him to set them aside especially in light of that particular statement. He doesn't believe taking a life is justified.

THE COURT: Challenge for cause?

MR. MATTHEWS: I'm sorry.

THE COURT: You are challenging for cause?

MR. MATTHEWS: Yes, sir.

THE COURT: Defense.

MR. MULLIGAN: Your Honor, we would object to the challenge of cause. I don't think this individual came close to the level of feeling or emotion that other jurors have been excused for cause on.

I think one of the things that importantly distinguishes him from some other situation is that

he not only in each and every occasion where he was asked a question in terms of following the law indicated that he would follow the law but he could actually verbalize why, why he could and came up with his own in doing it. He said this is a society, and a

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society has to have laws and there are the laws that we have to abide by.

And I think of significance also is the showing that he actually would be able to give serious consideration and would not be impaired by any personal belief with the question about having to talk to someone after imposing the death penalty. I think the suggestion was being made and perhaps given his views that he wouldn't be able to face other people if he returned a death verdict and his response was quite the opposite. In fact, he said if I did impose a death verdict, I would want to go to people close to me and talk to them about it. I think that shows a real willingness on his part to consider it and understand that he would not be impaired to give serious consideration to both sides.

THE COURT: Counsel, once again, we are dealing with very real people with real feelings about a subject that is very difficult for everybody to express their feelings about. I think that there is no question that Mr. Obeso has given it substantial thought. And in response to direct questions about whether or

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not he could follow the instructions and consider both sentences he said he could, and I believe that he can. Motion for challenge denied.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 3, 1993

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All right. Let's bring in Mrs. Henderson.

(Prospective Juror, Kristin A. Henderson, entered the court room.)

THE COURT: Good morning, Ms. Henderson. Anywhere in the middle of the front row would be fine. I know it may be a little unusual for you looking back this way rather than out that way.

MRS. HENDERSON: That is right.

THE COURT: Is Judge Garner going to be able to get along without you?

MRS. HENDERSON: Probably barely but he will be able to.

THE COURT: All right. You heard what we talk about this morning a little bit?

MRS. HENDERSON: Yes, I'm one of the ones that heard about the case beforehand.

THE COURT: So, I guess the first thing we need to ask you about is, what do you remember hearing?

MRS. HENDERSON: Let's see, I remember I guess about the time that the crime occurred hearing that a woman had been, I guess,

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kidnapped at SeaTac or near SeaTac. And then I don't remember what you said earlier today about her having been discovered in the trunk of a car. I remember that rape and torture were involved.

THE COURT: This is all from like three years ago?

MRS. HENDERSON: I don't know. I mean, it's just there. I don't know when I remember it from but, you know, contemporary with the events. I would not be able to tell you what happened.

THE COURT: All right. You work for the court system. You realize how awfully important it is for decisions to be bases on evidence produced in court and not on reports that fly out through the media?

MRS. HENDERSON: Yes.

THE COURT: Would you be able to assure us and counsel and Mr. Brown that you could disregard everything else you have heard on the outside.

MRS. HENDERSON: Yes.

THE COURT: And base your decision simply on what you hear in the courtroom?

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MRS. HENDERSON: Yes.

THE COURT: All right. I believe we start with the defense.

VOIR DIRE EXAMINATION

BY MR. CLEVEN:

Q Good morning, Ms. Henderson.

A Good morning.

Q My name is Kern Cleven. I'm one of the three defense attorneys for Mr. Brown. We have a third who was called away briefly this morning. I hope you don't take any offense at that?

A No.

Q We do have, were you in your career as a lawyer, have you been a litigator at all?

A Yes.

Q Have you been in the situation of jury selection?

A Actually not jury selection, no.

Q Have you had a chance to observe that in your work with the courts?

A No, actually, I haven't.

Q So, I would not be out of place if I explained a little bit of the procedure to you?

A No.

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Q As the Judge explained, we have a two-phase proceeding, or potentially a two-phase proceeding depending on the outcome of the first phase. And I assume that is a concept you're familiar with?

A Correct.

Q And right now our voir dire here at the front end has to be geared towards that final phase if we get there and make sure we have got all our basis covered.

The first phase, the guilt phase, would be pretty much like any criminal trial. The Defendant is presumed innocent and the burden is on the State beyond a reasonable doubt. The charges of premeditated murder with the aggravating factors alleged of that the murder was committed in connection with kidnapping, rape, a robbery and in order to eliminate a witness to cover up a crime.

If Mr. Brown were found not guilty, of course, the jury's duty would be over. If he were to be found guilty of only some lesser offense or only none of the aggravating factors were found, again, the jury's duty would be done with and any further proceedings would be

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handled by the court.

It is only if Mr. Brown is convicted of premeditated first degree murder and at least one if not all of those aggravating factors are proven to the jury that we get to the second penalty phase. And that has an analogous structure and then it begins with a presumption of a life sentence, a sentence of life without possibility of release or parole, a true life sentence, or the alternative being the death penalty. And in order to get to the death penalty, the State has to, again, prove beyond a reasonable doubt that the mitigating circumstances, or there are not sufficient mitigating circumstances to merit the leniency of a life sentence.

Are you comfortable with that conceptual structure now?

A Yes.

Q You have worked in this system I know for a awhile now and in the Pacific as well?

A Right.

Q What was the nature of the work you did there?

A I was an assistant attorney general for the government of a small country called the

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Federated States of Myconasia.

Q Did you ever have any position with any criminal issues there?

A Oh, a little bit. Our office prosecuted what we called natural crimes, certain crimes where I

suppose the analogy is that they were federal crimes. Our office dealt with those but I wasn't a litigator there. So, basically, my role was, my active role was pretty limited to stepping in when somebody was absent of course.

MR. MATTHEWS: Your Honor, could we take a break for a minute.

(Pause in proceedings.)

THE COURT: All right.

Q (BY MR. CLEVEN) He just wanted to let the other juror leave.

A Oh, okay. As I was saying, my role would have been limited to stepping in in the event of somebody who was handling a case who was absent. And, of course, I would talk about things with other attorneys but I never tried a criminal case there.

Q You were involved in enforcement activity, law enforcement activities of a sort?

A I suppose you would say that but my day-to-day

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activities were very seldom that. But I would, if everybody else in my office were off the island, that was the expression, I was the chief law enforcement officer for this small country. So, yes, in some sense I was.

Q All right. The reason, and you sometimes had to in your activities as a judicial clerk, you

have to enforce the Court's decisions about various matters or enforce various court rules?

A I don't know that I would say that I, I necessarily enforced them. I might allert the judge to something that needs to be enforced. I suppose I would enforce them to the extent that I would step between ex parte contacts between the judge, between some person and the judge, so I suppose you could call that enforcing rules.

Q If you're not actually enforcing the rules, you're at least operating within the structure of set of rules. It's very definite.

A Right.

Q But you're comfortable doing that?

A Yes.

Q You're comfortable doing that even when you might not entirely agree with some of the rules? If you had it to do, you might write the rules

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differently?

A Yes. I actually, the bankruptcy rule, I can't think of any that are really particularly anything I would particularly have quarrels with but, yeah.

Q So, as a professional, you have come to be comfortable with the notion that you have to, the rules have to be what they are and they have to be followed?

A Yes.

Q The reason I bring this up is I noticed in your questionnaire that you are a person who has some qualms about the death penalty?

A Yes.

Q And what I would like to ask you is, if you were selected to be on this jury, would you be comfortable following the Court's instructions and making a decision within the framework we have described?

A No, I guess I anticipated the question. I guess I would follow the instructions but I have, I guess, what you might call tangential feelings concerning having to do so. And if you want me to elaborate on those --

Q Please do.

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A -- I will. I would think you would. And it has really not so much to do with any of the people in this room or with particular offices that they work for, but I suppose it's a philosophical position. And, that is, I do, I guess resent being put, the possibility of putting, being put in a position to make that decision.

Had I chosen to be a judge in the King County Superior Court or to run for such a position, had I been appointed that, I think that would be different because I would have chosen, that would have been my choice. I would have, you know, made my peace in that respect.

But there's something, I guess, I don't know who I resent, I guess, the people of the state of Washington for putting a regular person in that position. So, that's what --

Q Now, you understand that as a professional, certainly, that our jury system is of very central significance to the way our criminal justice system --

A Right. And I know that my job is not to, you know, if I were a juror, my job would not be to like what I do, it's to do it.

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Q And, obviously, you vote regularly?

A I do.

Q And you participate in the bar association in the profession?

A I belong to the bar association.

Q Okay. And you participate in your community in various ways?

A I suppose I do, yes.

Q And try to be, generally, try to be a responsible citizen and a law abiding citizen?

A Yes.

Q Would you agree that it is a responsibility of being a citizen in our society and in our community to participate in this jury process?

A I would agree.

Q Given that and given the necessity as we have discussed of working within the framework of

a set of rules, would you be able to set aside your resentment and your feelings about the death penalty, which we're all entitled to have feelings about this. The question here is, would you be able to, not withstanding those feelings, accept the law from the Court, consider the evidence that is presented in court and make a decision, a reasoned decision under the

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law of the State of Washington?

A Yes, I would.

Q Thank you.

MR. CLEVEN: I have no further questions.

THE COURT: Thank you, Counsel. The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Ms. Henderson, would you agree with me that you have some awfully strong feelings on the death penalty?

A I would agree with you that I do.

Q Would you tell the Court basically how you feel about the death penalty, what you feel it does to a person?

A I guess I would primarily, my primary objection is what I think it does to a society as a whole, and I think I alluded to it in my answer to the questionnaire there. I think it makes, I think I used the word, brutes of us

all. I think I might even change that to I think barbaric. But I think it doesn't enhancement our advancement of as a people and a human race to put other

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people to death. I think it's, basically, it's, much of it anyway, is essential to a point that I don't think as a society we should go and then there are other reasons. I think sometimes the finder of fact is wrong.

Q I have got a question. On your questionnaire it sort of faded off at the end and I could not read that especially down at the very end.

A Interview . . . shall I just read my answer?

Q Yes. If you could speak up for the reporter.

THE COURT: For our record, Ms. Henderson, what number is this?

A This is question number 56.

THE COURT: All right. Thank you.

A And my answer is, "My husband and I talked about whether this might be the case I was summoned for. I expressed to various people my feelings about serving on a death penalty case. No particular something." That must be, I must have been in a hurry. I think I meant nothing particular about this case, though. That's what I meant to say.

Q (BY MR. MATTHEWS) Okay.

A But I didn't say it.

Q Would you agree there is probably quite a few

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people that feel that the death penalty is sort of a tough, sort of a horrible way of handling society's ills?

A Ask the question again.

Q Would you agree that there are a lot of people that think that the death penalty is sort of a horrible way of handling society's ills?

A There certainly are some anyway. I don't know how many.

Q Would you feel that you are a member of a group that feels that way?

A Yes.

Q I think you can understand where I'm coming from of course?

A I certainly can.

Q You speak in terms of brutish barbaric and so on, but then you say, gee, I can follow the law.

A Yes.

Q And it sounds to me like following the law is going to mean that you have got to set aside a lot of your ideals, a lot of your strong feelings about the value of life and so on. And it's just, would that be, is that a fair statement?

A No. I think my reason for saying that I would

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be able to follow the law, I think that comes from being a lawyer and feeling that extra

obligation, perhaps having that I guess ingrained in me or --

Q As we all do.

A Yes, right.

Q I think we all can understand that?

A I guess that's where I'm coming from in terms of my response.

Q So, do you feel that you're, let me put it a different way. Do you feel that your personal feelings about, and your strong feelings about the death penalty could impair you in any way when it comes to following the law?

A I suppose -- let me back up. This is sort of an indirect answer. But when you brought us in the first day some time last week and you met, briefly described the case, you described the death penalty phase of this trial. I understood you to say that mercy was a mitigating factor, so that gave me a little comfort.

And that might be, you know, I don't know what that means because I have never read pattern jury instructions for a death penalty phase of a case. I don't know what context that

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would appear. That's really, I don't know if that's an answer but it's a response.

Q So, what I guess I'm hearing you say is that because of your feelings you sort of would like to have a way out of this, too, have an escape route in which you could, an escape route

which you could take and mercy could be that escape route?

A I suppose you might say that.

Q Your feelings seem strong enough that when you're making decisions, in the back of your mind, you know, people talk of your heart of heart and so on, a deep spot inside of us. Those feelings about the death penalty are always going to be there. A little voice is going to be there all the time, isn't it? When you consider the law and everything else, isn't that little voice going to still be speaking to you, talking about the death penalty, talking about barbaric, brutish and so on? I know it's hard.

A I, having never been in a position, I mean, we take our beliefs with us where ever we go and whatever we do.

Q Okay.

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MR. MATTHEWS: I have no further questions, your Honor.

THE COURT: Ms. Henderson, let me just ask you a couple of final questions here.

VOIR DIRE EXAMINATION

BY THE COURT:

Q I read your questionnaire.

A Yes.

Q And I remember the particulars on there because I was trying to figure out what that word meant, too. I think I understand from

the questions that were asked of you by counsel sort of your feelings about all this.

You understand how important it is to have a jury of people that are seriously willing to consider alternatives. Do you think, and you're the one who can tell us better than anyone else in this courtroom, do you think that if it got down to the penalty phase that you would be seriously able to consider both of those alternatives, or are your feelings so strong that you say, no, I really, I mean, intellectually I could tell myself that, yes, maybe I could, but emotionally I understand that

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that would be an impairment?

A It would be difficult. I mean, I can see myself, I guess I could express it in body language perhaps. Pardon me. I would be sitting there like this. (Indicating).

THE COURT: Okay. Thank you very much. I know it has not been easy. Let me have you step back in there.

MS. HENDERSON: Okay.

THE COURT: Counsel.

MR. MATTHEWS: Your Honor, I would like to put on the record that her body language was that she crossed her arms, held her hand up, crossed her arms and sat back at that particular time.

We would challenge this juror for cause. I think she stated her beliefs quite strongly. She

certainly is much impaired as any other person that's been excused from the jury, and in some instances I would consider she is much more impaired. Her views are extremely strong, even her language barbaric, brutish and so on. I think it is very hard to assume that a person of this intellectual level would allow her strong feelings, feelings that are expressed

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in those terms not to interfere and create problems when it comes to making a final decision. I don't think she could be fair to the State in making a decision in this case. And I believe she is impaired.

THE COURT: Defense.

MR. CLEVEN: Your Honor, we would disagree. This is an articulate intelligent juror who thought hard and long about this situation and decided that she would be able to follow the law. Her body language as was accurately reported by Mr. Matthews in response to the last questions is simply an absolutely appropriate expression of what the situation would be at that point. It would be a presumption of life and the burden would be on the State to present proof beyond a reasonable doubt that the result should be otherwise.

This juror was very clear that she would be able to follow the law and work within the structure that we had described. Mr. .Matthews characterized for her her attitude about mercy as a potential escape valve. It's a factor that can be considered. And in response to the Court's questions, it was very clear that

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she would simply consider that. She would follow the instructions of the Court. She would give serious consideration if that were what she were required to do.

To excuse this juror would be a flagrant violation of Witherspoon, to excuse her for cause, and I would urge the Court to review again Crane vs. Mississippi if the Court has any though of doing this. This would be an absolutely reversible error if this juror were excused for cause at this point. Its' beyond me why the State even requested it.

MR. MATTHEWS: Well, your Honor, we continue to request it. We do not feel it's a reversible error. We feel she is impaired. The argument that he is using now are exactly the arguments that we used the other day. And Mr. Cleven, at that time, was saying that following the law is not sufficient. I don't believe she can follow the law.

THE COURT: She is exactly the flip side of Mr. Jeremy Eisenman this morning counsel. In my opinion in terms of the position versus State and defense, I think she is substantially impaired given her responses. It

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was obvious. The Court will go ahead and excuse her for cause.

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THE COURT: All right. Richard Deal. (Prospective Juror, Richard Deal,

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entered the courtroom.)

THE COURT: That's fine, Mr. Deal. Good afternoon.

MR. DEAL: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

MR. DEAL: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

MR. DEAL: No, I did not.

THE COURT: Okay. We'll start with the defense.

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you

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some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might be, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe

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situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the

Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendant actually came out and said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would - -

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there

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would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the

State would first have to prove that you had committed a premeditate murder and one that had been thought about beforehand.

Do you have any kind of feeling that something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that

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it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or things of that that lead a person to do things that they would not normally do, I think that would enter into it.

Q All right. Other than - - well, maybe what we should do - - the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without

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parole is exactly what it sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus

aggravating circumstances beyond a reasonable doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible

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and would reviolate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the

death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

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Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have covered this

already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating

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circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime like that presumes that the sentence, the appropriate sentence is life without parole. The State has the burden of

proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt

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that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will defines it for you, but the definition is real broad. The

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definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with - -

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: Mr. Deal, you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed

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this kind of crime. You realize that there are particular defenses that may be available in the actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not taking about the crime in any way, and you're simply trying to determine what the appropriate

punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

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Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the

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responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Mr. Deal, I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussions about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death

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penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove

beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

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A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means - -

A (Nodding head).

Q - - that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and

the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

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Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death

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penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

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A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the

death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. Mr. Deal, there is something that I want to clarify in

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response to some of the questions that were asked of you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a

question of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or

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something over the years. But I guess the point I was making that it has to be - -

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: Mr. Deal, let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he

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means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal.

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FILED

94 MAY 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 4, 1993

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(Prospective Juror, Lisa M. Denis, entered the courtroom.)

THE COURT: You are Ms. Denis; is that correct?

MS. DENIS: (Nodding head).

THE COURT: Did you have any questions at all about things I talked about this morning when we brought all of you out here?

MS. DENIS: No.

THE COURT: Have you ever been a juror before?

MS. DENIS: (Shaking head).

THE COURT: All right. Now, I do remember from before that you were scheduled to be married late this year?

MS. DENIS: Yes, and my plane leaves December 22 to Boston.

THE COURT: December 22?

MS. DENIS: Yes.

THE COURT: And the wedding is back east?

MS. DENIS: Yes.

THE COURT: In Boston?

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MS. DENIS: Yes.

THE COURT: Did you nod your head at all about having heard anything about this case before?

MS. DENIS: I didn't live in the state at the time.

THE COURT: And since you've been here as a potential juror, have you been able to say away from any press about this?

MS. DENIS: Yes.

THE COURT: I believe we start the questioning with the defense.

MS. HUPP: Thank you, your Honor.

MR. MATTHEWS: Your Honor, could we approach the bench first about one thing?

THE COURT: Sure.

(Side Bar.)

THE COURT: Thank you, Ms. Denis for your patience. But you're sure you really want to get married? That's what we were discussing.

MS. DENIS: Ha, ha. I didn't know if I appreciated the 50 percent here.

THE COURT: I didn't mean to do that. I do that to everybody that comes through here asking to be married by me. So, aside from

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that, we were, there was obviously some concern to your cut off date. I can assure you that one way or another you would be released on that particular day. If something happened and the trial were still going on, we would work it out so that you would be able to go.

MS. DENIS: To the wedding and the honeymoon or just to the wedding?

THE COURT: Ha, ha. Don't worry about it.

You heard what we talked about this morning, though, and some of the areas that they wish to get into. You didn't know anything about this case at all?

MS. DENIS: No.

THE COURT: The other area is, do you have any questions to offer to me about the basic concepts that I talked about, the two phases?

MS. DENIS: We would go into more like what lack of mitigating circumstances, we wold go more into, you would give us more instruction?

THE COURT: Yes. Oh, definitely. Right. The first phase ought to do with

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determining whether or not the State can prove that he committed this crime.

I believe we start with the defense?

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Now, we can get started on what you thought you were getting into when you walked out here.

The first thing I want to tell you is that one of the most important things for you to keep in mind here is that we're not, there's no right or wrong answers here. This isn't a test. We're just asking about your opinions so that we can gather some information to do our job. Okay?

A (Nodding head).

Q All we want and all we expect out of you is honest answers?

A (Nodding head).

Q And honest answers on things that are hard to answer. The questions I will be asking you are about things that I'm sure you haven't studied up on too much, certainly not as much as the lawyers and the Judge in this courtroom have?

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One of the things that I want to talk to you about is the law especially as regards kind of the starting point where you start out and how you move through the trial. Okay.

And have you ever seen a trial before?

A On TV.

Q Okay. So, you have never sat through a regular trial like this?

A No.

Q You watched the Raymond Burr tape and you read your little juror's handbook. I'm assuming that you have at least some idea of how the regular part of the trial goes where you're trying to decide if somebody is innocent or guilty?

A Yes.

Q And you understand that you start out with the presumption that the person is innocent?

A Yes.

Q And then the State has to prove the case beyond a reasonable doubt?

A (Nodding head).

Q Do you have any kind of problems with that?

A No.

Q Makes perfect sense to you?

A Yes.

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Q Do you think that you're capable of doing that, deciding whether or not somebody is innocent or guilty of a crime?

A Yes, I do.

Q Now, to get to the kind of special part of this trial, there's every chance in the world that we wouldn't get to that trial at all, the second part of the trial. The only way that you would get to a penalty phase in Washington and under Washington law is if the jury finds the defendant guilty but not just guilty of just murder but also aggravating circumstances.

And what that means is that the jury would have to believe beyond a reasonable doubt that the defendant had committed a premeditated murder and that, in addition, he had in this case as is charged, he had either done it during a rape, a robbery, a kidnapping and/or in order to eliminate a witness.

And it's possible at the end of this trial in the penalty phase that the jury could have found that he did all of those. That he did the premeditated murder and he did it with all of those aggravating factors. That's where your start off. That's if the jury find beyond

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a reasonable doubt the person has done all of those things with at least one of those aggravating circumstances, then we're at the point where the jury needs to decide the penalty. That's where we get the mitigating circumstances stuff. Okay?

First of all, even though the jury found the person guilty beyond a reasonable doubt of all of those things, and actually it's a very horrible crime, the jury starts off presuming that life in prison without parole is the appropriate sentence. A law in Washington says that that is an appropriate sentence, the appropriate sentence unless the jury decides otherwise.

Does that make sense?

A (Nodding head).

Q Now, nobody is going to require that the jury find that death is the appropriate sentence. That's a decision the jury makes. Nobody tells the jury what to do, but the Judge does give you law and guidance and tells you how to make that decision.

Does that make sense?

A Yes.

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Q Okay. The law that the Judge gives you, one of the things he does is he tells you to presume that you are to start off presuming that life is the appropriate sentence, and then in order to move off of that presumption at all, the State again has the burden. They have the burden of proving beyond a reasonable doubt that death is the appropriate sentence.

One of the things that jurors look at when they are looking at making that decision is whether there is mitigating circumstances. You had kind of a question about mitigating

circumstances. The judge would instruct you about kind of a broad definition of what mitigating circumstances are.

But mitigating circumstances can be things like a person's background, their childhood, their emotional development, their mental health.

Do you think you could consider things like that?

A Yes.

Q The question that the jury ends up getting asked at the end is this one, and you need to look at it, and it's kind of confusing. But the general

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idea is that the State would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances before the jurors can even vote for the death penalty. Okay.

And the other thing that you should probably know is that the jury, in order to return a death verdict, would have to be unanimous, all the jurors would have to agree to that. In order to return a verdict of a life sentence, the jurors, just one juror, two jurors or three jurors, if all the jurors can't vote for a death sentence, then a life sentence is imposed.

Does this make sense?

A Yes.

Q Okay. Now, does that make you feel a little more comfortable about what we're looking at here?

A Yes.

Q All right. I noticed in your questionnaire that you had noted that you have some concerns or you have struggled with the issue of the death penalty in your life?

A Yes.

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Q It sounded to me as though you have moved from being absolutely opposed to it to a position where you can at least consider, you can understand why it is that some people consider it's necessary?

A I guess the state that I lived in before, it wasn't, there wasn't a death penalty so I grew up, it never was that much of an issue. When I moved here, I didn't realize it until it was in the news one day. And at that point, I started thinking a bit more about it. It would be a very difficult position for me.

Q Right. And I think --

A So.

Q Yeah. It's a real difficult decision for a lot of people.

Have you ever had to decide before anything that was basically a life or death decision?

A No. I don't know. I honestly, and I struggled with this the last week, have, I just -- I don't know if I could vote, I don't know if I could.

Q And understanding that it's especially hard to try and think of something like that when you haven't heard any of the evidence and you're not

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sitting there in the jury box and we're here at the beginning of the trial instead of all the way to the end of the trial.

You have never been on a jury before, right?

A No.

Q You have never had the experience of trying to apply the idea of beyond a reasonable doubt before?

A No. I have had theoretical, I have a friend that is a lawyer, and we have kind of had many theoretical discussions when he went to law school also. So, I have been, but I have never had that opportunity.

Q Sure. You do know that it's the highest standard that we have in our criminal justice system?

A Yes.

Q I mean, as far as beyond a reasonable doubt, it's the highest burden of proof that we have?

A Right.

Q So, you basically are a law abiding person?

A (Nodding head). Yes.

Q Especially here with the judge listening to us, right. Okay.

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And you basically are a civic minded person, you vote or else you wouldn't be here?

A Yes.

Q You're involved in the community?

A Starting to be. We just moved here, but I very much want to be.

Q I get the impression you're a fairly cautious, careful person?

A Regarding?

Q Regarding important things.

A Oh, yes.

Q You don't do snap judgment as far as the important in your life?

A No.

Q Do you think that it's fair if the only people that sit on a death penalty case on the jury are people who object strongly to the death penalty?

MS. FRICKE: Objection, your Honor, improper question?

THE COURT: Objection will be sustained. Ask another question.

MS. HUPP: Okay.

Q (BY MS. HUPP) You understand that it's not an easy decision for anybody to make?

A (Nodding head).

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Q You understand that sometimes a country asks you to do this?

A I guess that's why I'm here.

Q Sure. Sure. Do you have any doubts about your ability to be fair to both sides in the guilt phase of the trial, in other words, in deciding whether or not the defendant committed the crime?

A (Shaking head).

Q Okay. The court reporter is trying to write down everything you say so sometime when you talk real quite it's difficult for him to get.

A Yes.

Q Now, you did put in your questionnaire that as you thought about the death penalty one of the things that you thought about, you had that sort of you grew up believing it was wrong and then one of the things that sort of made you think that maybe it's okay with generalizing about justice?

A I guess that theoretical discussions the point that a truly horrible, horrible, horrible beyond a reasonable doubt type person like Jeffrey Daughmer, in that case, is this not acceptable? And, you know, I felt the taking

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human of life was wrong. It's just not right. But I have been able to see another's point of view in that discussion. But, again, it's very different to have a discussion and to be in that position.

Q Sure, it is. Of course, it is. You're wondering what is proper here. You're sort of feeling that way.

So, there are some crimes that are so horrible that even basically a sentence of prison sort of offends your sense of justice?

A I guess that what would be it.

Q Now, I kind of laid out a little bit of what it is that the State is charging here. What they're expecting to present evidence of is a relativly horrible crime. We're taking about, they're saying that this is premeditated, that it was done, that this murder was done during the course of a robbery, a kidnapping and a rape, that the premeditated murder was done in order to eliminate a witness. In addition, you might hear during the trial that there was, the defendant deliberately inflicted pain on the victim before he killed her.

So, does that sounds like it might be

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the sort of case where it might fit into that classification where you think this might be one of those case where at least the death penalty should be considered?

A Possibly.

Q I know it's really tough for you because you're really bearing the weight of the responsibility possibly of being a jury here.

Do you think that, without asking you to make guesses about what you would actually do as far as voting, I'm not asking you to commit as far as voting, what you would vote, but do you think that if you were to sit on jury, that you could follow the Judge's instructions, okay, just follow his instructions? Do you think you could do that?

A Yes.

Q And do you think that you could follow his instructions to consider the possibility of a death penalty as a sentence?

A Oh, yeah, I could follow the instructions. I think that -- actually making that decision, no.

Q It's a tough one. It's a real tough one.

You could, though, what I'm hearing you say is that you could follow the

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instruction. Could you discuss with the other jurors what you think about mitigating circumstances, what you think about the crime? You're nodding your head, and I need you to --

A Yes.

Q You could discuss that. And you could hear the other juror's opinions about what they think about the crime and what kind of punishment it deserves?

A Yes.

Q And you could talk to them about what they think mitigation, what they think about the mitigating circumstances?

A Yes.

Q And the question I'm hearing in your head is whether or not you would be capable of actually voting for death?

A Right, it would be a moral issue with me.

Q Okay. And you do, although, you have got that sort of emotional response here, you do think that you could put those emotions aside in order to follow the Judge's instructions?

A Yes.

Q Thank you. I'm not going to ask anymore questions, but the prosecutor is going to ask

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some questions. Okay? Thank you.

A Okay.

THE COURT: Mr. Matthews.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Hi, I'm Al Matthews. I'm one of the two prosecutors in the case.

A Hi.

Q This wedding apparently is going to take place on the back east coast?

A Yes.

Q Are you going to be doing, helping in the preparations by long distance, or how is that going to work?

A There are done just about.

Q If this trial goes close to your wedding date, do you think you're going to be a little distracted thinking about that, too, or worried?

A I would be if it got to be the 21st and we were still --

Q Well, the Judge isn't kidding. You're going to get over to the wedding no matter what.

A I think it would be natural to be distracted. It was a hard decision to go ahead and to be

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here for me but it's important to do this.

Q Now, you've spoken about the Daughmer case. What state did you come from?

A Massachusetts.

Q And they do not have a death penalty?

A No.

Q So, this is something fairly new to you?

A Yes.

Q Have you discussed it with anyone since, well, who have you discussed it with?

A My friend.

Q Did the discussion take place before or after you found out you were going to be on a jury?

A We had discussed it before, actually, when we both realized that the death penalty was in Washington. We discussed it at length at that point, and then when I came home and I was, you know, emotionally thinking a lot about this and we did discuss it briefly. I tried not to get to deeply into it. He was wondering why I was so, thinking a lot about it, thinking and not communicating a lot.

Q Okay. Could you share with us just a little bit how the discussions went and what your feelings were?

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A Both discussions?

Q Yes.

A Well, again, it was a moral issue of taking a life. Do we have that right to do that? Is that our position? That's the kind of way that I thought.

Q And its sort of, I don't mean to put words in your mouth, but sort of does it accomplish anything for taking a life for a life. Is that the sort of way the discussion went?

A Yeah, along that lines Yes. What does it prove?

Q In other words, if the State prosecutes someone for taking a life but then they might turn around, and the State might then take life back themselves. Does that make sense to you? Does that bother you?

A Kind of does that even it up?

Q As I said you mentioned the Daughmer case, and you found that particularly horrifying. What was it about that case, the number of people involved, the ages of the people, the acts that he committed?

A The broad scope of the number of people, the fact that it just effected so many people, so

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many families. And that was probably one of the cases where in a conversation does this horrible man --

Q And it's certainly a case a lot of people have heard about?

A Right.

Q Was there any other case that you can think of that entered your mind when you thought of the death penalty?

A Ted Bundy.

Q Ted Bundy. Okay. And, again, that was quite a few people?

A Yeah, and it was just so publicized.

Q Sure. Now, I think it may become apparent to you from the talking we have done over the last few days that there is only one death involved in this particular case?

A Yes.

Q And you are going to hear a lot about it during the guilt phase. And at the end of the guilt phase, of course, you will have to make a decision, and based upon that decision, we

really decide whether we're going to go on to the penalty phase. In other words, if you find him not guilty or do not find him guilty of

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premeditated murder plus an aggravating factor, that would ~~end the~~ case right there.

Would that sort of give you a sense of relief or not?

A It definitely would be a sense of relief not to have to go to the death penalty, yes.

Q Now, if that's the case and you seem to be, you seem to be very candid with us, if that's the case, would you, knowing this might go to a death penalty face, would you want us to prove and convince you beyond any doubt that he actually did it? Would you want to be absolutely sure that he did the crime before you would vote him guilty?

A Oh, yes.

Q Now, you have heard the term beyond a reasonable doubt. And you know that doesn't mean beyond all doubt. It doesn't mean beyond a shadow of a doubt.

Would you be comfortable talking about putting someone to death if we had not proved it beyond a ~~shadow of~~ a doubt?

A It would be to a point of a shadow of a doubt. It would have to be crystal clear, yes.

Q Now, let's suppose that we get to the penalty

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phase. And you know there is two options at that time, life in prison without parole and death. And you know it takes the vote of every person on the jury to, every person has to vote for death before the death penalty is imposed. If one person says no, that's the end of it.

Now, you said to Ms. Hupp that you would be willing to consider, first of all, you would be willing to consider all the mitigating circumstances, things about his life and anything else they might present. And I'm sure you would consider that real fairly?

A Yes.

Q And I'm sure you don't have any problem at all started out with the idea that he should be facing life in prison without parole and not death?

A In the penalty phase?

Q Yes. So, that would be the most comfortable sentence for you and the one that you would be willing to start with?

A Yes.

Q And, of course, you recognize at this point that we're going to be trying to prove to you that there is a reason to put him to death?

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A Yes.

Q Now, would you want us to prove, to convince you -- you said you would consider imposing the death penalty, and you think a lot about it and you would consider it; is that right?

A I would be asked to consider it if we got to --

Q And you could do that?

A (Nodding head).

Q I want to take on step further. We're going to ask you not only to consider it, but we're going to ask you, and we're not asking for a promise or anything at this point. I'd like you to think just a little bit further and decide beyond considering the death penalty, do you think in your heart of hearts you could actually in a case like this ever merely vote to impose the death penalty?

MS. HUPP: Objection, your Honor. The phrasing of the question is asking for a commitment.

THE COURT: Ms. Denis, they're not asking or a commitment. Do you understand the difference between considering theoretical discussion but putting yourself in the position of saying I have to actually do something like

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this? Do you understand that?

A Yes, I was considering it before I went to this point.

THE COURT: Certainly, you wee considering it before. The question that's being asked of you by counsel, if it's not clear to you is, aside from considering it, do you think that if after full consideration you were convinced by the State that you're the kind of person given your own knowledge, your own background, your own opinion that could actually vote to impose a death penalty?

A I don't think I could. It would have to be so crystal clear. It would just have to be --

Q Okay. Well, thank you for being honest with us.

MR. MATTHEWS: We have nothing else, your Honor.

THE COURT: Ms. Denis, let me have you step back in the juryroom for just a minute.

Mr. Matthews?

MR. MATTHEWS: your Honor, we would challenge for because she is impaired. We feel that she feels very strongly about these things that she is going to impose a greater burden on the State in both the guilt phase, and I think

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it's obvious from her conversation that she would like to see it end at the guilt phase and she certainly realizes it can end at the guilt phase if he is not found guilty of premeditated murder with aggravating factors. That doesn't bother me too much.

I thinks she would certainly try to push beyond that, but I think she is going to hold us to a higher standard. I think the real problem, though, is when it comes to the fact that she might actually have to impose the death penalty. I think she is very clear about it. I think her body language and I think everything we have seen, her answers to the question and even the way she sort of, I was going to say took deep breaths at certain times when she was asked certain questions, I think she is trying like mad to comply with the law.

But I think she knows that inside of her there is going to be a voice at the back of her mind that basically tells her she can't do this. I don't think she has it in herself to the impose the death penalty. And for that reasonable we fell she is substantially impaired and would ask that she be refused for cause.

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THE COURT: Ms. Hupp?

MS. HUPP: your Honor, we do not believe that this juror is substantially impaired. I would point out a couple of things. First of all, she never expressed any concern about her ability to be fair in the guilt phase. The only thing that she said was that she obviously believed if the defendant, if we would even get to a penalty phase, but that she was instantaneous every time she answered that she could be fair in the guilt phase.

She has never been on a jury before. She has not heard the definition of beyond a reasonable doubt. She used the same phrase for the guilt phase and the penalty phase as far as what burden she wanted. She wanted to be sure. She wanted things to be crystal clear. When we talked about beyond a reasonable doubt that she has, I would submit as a matter of fact, that that's the sort of standard. She doesn't know legal terms. She is just telling the Court that she would expect it from the State, she would expect them to prove their case. She is not hold them to a different burden in either side.

She indicated that she could and would

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consider the death penalty. She indicated that this case would fit with the class of cases that she thought the death penalty might be appropriate. As this other example she gave, if it was in that where Jeffrey Daughmer and Ted Bundy, I think we have heard a whole bunch of the jurors give those as examples of cases that they thought justice might require the death penalty rather than just life in prison.

The law does not require that she be able to read her own and mind say, yes, I could impose the death penalty. The law requires that she be able to consider it. And she told the Court that she would be able to consider it. She indicated she could deliberate. She indicated that, I can only emphasize, again, that this case fits within the class of case that she thinks the death penalty might be appropriate.

So, I don't think she is substantially impaired and would ask the Court not to excuse her.

THE COURT: Counsel, it is close, as a lot of these questions are listening to her responses. She has never been a juror before.

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She doesn't know technically what the definition of beyond a reasonable doubt is. I doubt that anybody in this room knows technically what beyond a reasonable doubt really means and even in your own mind.

However, she is a little bit different position that a lot of other lay people. One of her fiance's closest friends, as she indicated, is a lawyer and has discuss it going through law school. I think she has fairly good understanding of what we're talking

about. I was not so concerned with her responses of beyond a shadow of a doubt or crystal clear. I think that definitely could fit within the definition of a reasonable doubt.

But what this Court was concerned about was in response to my question, could you consider it? Sure, I've been considering it all along. It's a very real response. Or would you be the type of person that given your makeup, your background, et cetera, that could vote to impose it. Her direct response at that point is, I don't think I could, I don't think I could do it. I believe that meets the definition of substantial impaired.

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MS. HUPP: And I would just point out to the Court that she added to that it would help to be crystal clear. Again, she was just indicating, it's our position she was just indicating that the State would have to prove it.

THE COURT: The court will excuse Ms. Denis.

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FILED

NOV 12 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Caption Omitted In Printing]

DEFENDANT'S MOTION TO RECALL VENIRE MEMBER OR FOR MISTRIAL AND NEW PANEL, WITH MEMORANDUM

***

I. *MOTION*

COMES NOW the defendant Cal Coburn Brown, moving the Court to recall venire member Kristin Ann Henderson, excused by the Court on the State's challenge for cause on Wednesday morning, November 3, 1993. In the alternative and in the event Ms. Henderson is no longer available or since her release has been exposed to publicity or otherwise disqualified, Mr. Brown would move for a mistrial and for a new panel of prospective jurors to be called. This motion is brought pursuant to the guaranties of U.S. Const. ams. VI, VIII, and XIV, Wash. Const. art. 1 §§ 3, 14, and 22, and CrR 6.4(a) and (c). It is based on the proceedings of record herein, and further supported by the memorandum which follows.

II. *MEMORANDUM*

A. *STATEMENT OF CASE*

During preliminary voir dire on issues specific to the death penalty, venire member Kristin Ann Henderson was called and questioned as to her qualifications to sit as a juror in this case. Ms. Henderson's confidential juror questionnaire, which is preserved elsewhere, included several responses clearly indicating a general antipathy towards the death penalty. The substance of these responses, including words such as "brutish" and "barbaric," was reaffirmed during oral questioning. She also indicated that she was relieved when she heard the Court's instruction that "Mercy, in and of itself, may be a mitigating circumstance," and further stated, with the help of gestures, that she would adopt a "prove it" attitude if called on by the State to decide that a penalty of death was warranted.

Ms. Henderson, who is trained and employed as an attorney, consistently stated that she would set aside her feelings about the death penalty to the extent required to follow the court's instruction and dispose of all issues in accordance with the evidence and the law. Nonetheless, the State challenged her and the Court excused her as "substantially impaired" pursuant to *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S.Ct. 844 (1985).

A transcript of her voir dire has not been requested, as Mr. Brown's disagreement regarding the Court's ruling has to do with the application of a standard rather than the wording of any of the juror's responses. If the Court has any uncertainty

or disagreement about those responses, Mr. Brown would suggest that a transcript be obtained.

B. *ARGUMENT*

Twenty-five years ago, the United States Supreme Court condemned the use of challenges for cause to exclude death-scrupled jurors from service on death penalty juries. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S.ct. 1770 (1968). The problem presented in *Witherspoon* grew out of a trial court proceeding in which

> the tone was set when the trial judge said early in the voir dire, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

391 U.S. at 514-15.

One juror was questioned about her scruples and, without indicating any abolitionist sentiment or any inability to set her feelings aside, indicated that she "would not 'like to be responsible for . . . deciding somebody should be put to death.'" 391 U.S. at 515. The Court ultimately determined that exclusion of such jurors amounted to unfairly and unconstitutionally preselecting a "hanging jury." 391 U.S. at 522. In two footnotes that were to become the case's better-known legacy, the Court allowed that prospective jurors could be constitutionally excluded for cause when their view on the death penalty precluded a fair consideration of the evidence or a fair application of the law. 391 U.S. at 515 n. 9 and 522 n. 21. The Court was careful to point out, in another footnote, that

> [i]t is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

391 U.S. at 514 n. 7.

After *Witherspoon* was decided in 1968, the death penalty went into a brief eclipse between *Furman v. Georgia*, 408 U.S. 238, 32 L. Ed. 2d 346, 92 S.Ct. 2726 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S.Ct. 2909, (1976). The *Witherspoon* issue was subsequently revisited several times, and in 1985 the Court made it clear

that a slavish adherence to the exact text of the *Witherspoon* footnotes was not required, and that, in fact, the constitution permits exclusion for cause of any juror whose "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). The majority made it clear that this was not a retreat from the essential holding in *Witherspoon*, but merely a modification of the tests indicated, arguably in dicta, in *Witherspoon*'s famous footnotes. *Witt*, 469 U.S. at 424 n. 5.

After *Witt*, the next landmark case about death-penalty jury selection was *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986). Justice Rehnquist, as he had in *Witt*, wrote the majority opinion in *McCree*. In explaining the nature of the "death-qualifying" test first permitted by the *Witherspoon* footnotes and later modified in *Witt*, Justice Rehnquist offered the following observations:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. . . [T]he group of "Witherspoon-excludeables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case.

476 U.S. at 176. Elsewhere in the opinion, it is made clear that the term "Witherspoon-excludables" took account of the *Witt* modification. 476 U.S. at 167 n.1.

About a year later, the Court returned to the issues involved in death penalty jury selection in *Gray v. Mississippi*, 481 U.S. 648, 95 L.Ed.2d 622, 107 S.Ct. 2045 (1987). In *Gray*, the trial court had excused for cause a juror who was not excludable under *Witherspoon* and *Witt*. The trial court's action was taken after the State, having exhausted its peremptory challenges, indicated that it would challenge the juror if another peremptory were available, and also after an argument that the Court had forced the State to use several of its challenges by refusing to excuse for cause other jurors who were excludable under *Witherspoon* and *Witt*. 481 U.S. at 651-57. After stating the rather convoluted procedural facts, the Court reviewed and reconfirmed the principles first expressed in *Witherspoon*, adhered to in *Witt*, and reaffirmed in *McCree*. 481 U.S. at 656-59. The Court went on to recognize the clear error presented, and to hold that harmless-error analysis generally does not apply to *Witherspoon* violations. 481 U.S. at 659-72 (constituting majority and in part plurality opinion by Justice Blackmun and concurring opinion, establishing majority on rejection of harmless-error analysis, by Justice Powell). This latter holding represented an affirmation of the Court's earlier per curiam opinion in *Davis v. Georgia*, 429 U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976) (where one juror was dismissed in violation of *Witherspoon*, reversible error was found even though other similarly-situated jurors were not dismissed).

In the context of this case, the cases discussed above show that the excuse for cause of venire member Henderson was per se reversible error, not subject to harmless-error analysis. While it would not be inaccurate to describe Ms. Henderson's responses as indicating an extreme distaste for the death penalty, she nonetheless made clear that she would subordinate her personal views to the requirements imposed by the law and by her oath as a juror. This is all that *Witherspoon* requires, 391 U.S. at 514 n. 7, and remains all that is required after *Witt*, see *McCree*, 476 U.S. at 176, *accord*, *Gray*, 481 U.S. at 658.

C. *CONCLUSION*

Mr. Brown respectfully moves that the Court recall juror Henderson or, in the alternative, that the panel be stricken and another summoned to commence voir dire anew.

Respectfully submitted,

/s/ Terry L. Mulligan

TERRY L. MULLIGAN, WSBA #16076

/s/ Lin-Marie Hupp

LIN-MARIE HUPP, WSBA #16149

/s/ Kern Cleven

KERN CLEVEN, WSBA #13455

Counsel for Cal C. Brown

FILED

NOV 16 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Caption Omitted In Printing]

DEFENDANT'S MOTIONS TO RECONSIDER RULINGS DENYING CHALLENGES FOR CAUSE AGAINST JURORS MCKENNAN AND DRAKE, WITH MEMORANDUM

***

I. *MOTIONS*

COMES NOW the defendant Cal Coburn Brown, moving the Court to reconsider its oral rulings herein denying Mr. Brown's motions to excuse for cause prospective jurors Robert Eugene McKennan and Donna Maxine Drake, each based upon the juror's responses during preliminary voir dire limited to issues surrounding the death penalty and exposure to pretrial publicity. This motion is brought pursuant to U.S. Const. ams. VI, VIII and XIV, Wash. Const. art. 1 §§ 3, 14 and 22, CrR 6.4(c) and RCW 4.44.170(2) and 4.44.190. It is based on the record of proceedings herein, including a transcription of juror McKennan's voir dire, and further supported by the memorandum which follows.

II. *MEMORANDUM*

A. *STATEMENT OF CASE*

During preliminary voir dire herein on issues relating to the death penalty and pretrial publicity, venire member Robert Eugene McKennan was question on Tuesday, November 2, 1993 and venire member Donna Maxine Drake on Monday, November 8, 1993. Before completing their questionnaires, both prospective jurors had heard the Court's advance oral instruction outlining the bifurcated trial process, including the text of the statutory question in a death penalty sentencing proceeding and an abbreviated definition of "mitigating circumstances."[1]

On their questionnaires, both these jurors denied any general feelings about the death penalty. Both also denied any religious, conscientious, political or philosophical views influencing their views about the death penalty (in response to the question about religious or conscientious convictions, Ms. Drake added, "I truthfully feel it's on an individual basis.")

Just before oral questioning, each of these jurors was again advised orally by the Court of the bifurcated trial process. This time, each juror was part of a much smaller group (perhaps half a dozen venire members), and the Court's explanation was aided by a chart which clearly delineated the two phases of trial, the continuing burden on the State to

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[1] The Court's advance oral instruction did not make mention of the presumption of life or burden of proof in a death penalty sentencing proceeding, except to the extent indicated in the statutory question.

provide proof beyond a reasonable doubt, and the corresponding presumptions of innocence (guilt phase) and of life (penalty phase). The Court's explanation to Mr. McKennan's group has been transcribed.

The oral questioning of each juror developed in a similar fashion: Each gave responses indicating a predisposition to automatically vote for a penalty of death upon conviction; each gave other responses indicating a desire and intention to follow the court's instructions.[2] For each of these jurors, the latter responses tended to be the result of detailed leading questions. In each case, Mr. Brown challenged for cause, and in each case the challenge was denied.

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[2] Mr. McKennan's responses to this effect appear at pages 8-14 of the transcription of his voir dire. In this portion of his voir dire, Mr. McKennan indicated that the death penalty was the only appropriate penalty for premeditated murder; described the presumptive sentence for aggravated murder as sitting in jail, eating nice food, and watching T.V. for the rest of one's life; specifically rejected life without release or parole as a meaningful alternative to death; and indicated he would need "overwhelming evidence" or a "recommendation of the court" in order to consider a sentence other than death. Even after further instruction from the Court, Mr. McKennan indicated, at pp. 23-24, that nothing he had heard affected his basic position. It is counsel's recollection, and the record will confirm or not, that Ms. Drake gave responses similar to Mr. McKennan's, in her case indicating that death would be the appropriate penalty if the State had proven premeditation and an aggravating circumstance. Ms. Drake's response to this effect actually came towards the end of her voir dire, while Mr. McKennan's was nearer the beginning of his.

Mr. Brown now asks the Court to reconsider these rulings.[3]

B. *ARGUMENT*

The United States Supreme Court first indicated that the *Witt-Adams* standard for exclusion for cause (juror's views would "prevent or substantially impair" performance) was mandatory where a juror's predisposition impaired the ability to consider a sentence other than death in *Ross v. Oklahoma*, 487 U.S. 91, 85-86, 101 L.Ed. 2d 80, 108 S.Ct. 2273 (1988). The binding effect of the views expressed in *Ross*, however, was subject to some doubt, as no prejudice was found in that case, the defendant having removed all death-prone and properly excludable-for-cause jurors through peremptory challenges. The voir dire of the juror who apparently should have been excluded in *Ross* was described thus:

> Darrell Huling's name was drawn to replace the juror excused by the defense with its fifth peremptory challenge. During voir dire, Huling initially indicated that he could vote to recommend a life sentence if the circumstances were appropriate. On further examination by defense counsel, Huling declared that if the jury found petitioner guilty, he would vote to impose death automatically.

487 U.S. at 83-84.

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[3] In asking reconsideration of these rulings, Mr. Brown does not abandon any of his other challenges for cause denied by the Court; these two have been singled out as, in counsel's view, the most obviously erroneous rulings.

The view suggested in *Ross* was made unmistakably effective several years later, in *Morgan v. Illinois*, ___ U.S. ___, 119 L.Ed.2d 492, 112 S.Ct. 2222 (1992). In *Morgan*, the trial court inquired specifically whether any member of the venire "had moral or religious principles so strong that he or she could not impose the death penalty 'regardless of the facts.'" 119 L.Ed.2d at 498. The trial court, however, refused a defense request to inquire whether any juror would automatically vote for death, regardless of the facts, if the defendant were convicted. The trial court apparently felt it was an adequate substitute to ask each juror some version(s) of two questions, the first asking whether the juror would follow the court's instructions on the law, even though the juror might disagree with the law, and the second asking whether the juror knew of any reason he or she could not be fair and impartial, or give both sides a fair trial. 119 L.Ed.2d at 499.

The majority opinion gives clear and unequivocal effect to he *Ross* language which seemed to have extended the *Witherspoon-Adams-Witt* line of cases so as to constitutionally require the exclusion of death-prone jurors. 119 L.Ed.2d at 502-503 (Part II B). In rejecting Illinois's claim that the trial court's questions had been adequate to this end, the Court observed that, by its very nature, a disqualifying bias will often prevent an individual from recognizing that his or her views are inconsistent with the law or with an ability to be fair

and impartial.[4] 119 L.Ed.2d at 506-507 and n.9 (Par II D); *see also* 119 L.Ed.2d at 499 n.2.

If "follow-the-law" and "be-fair-and-impartial" questions do not suffice to disclose a disqualifying bias in favor of the death penalty, it naturally follows that responses couched in such terms are inadequate to overcome the disqualifying effect of other responses clearly indicating such a bias. Where, as here, the disqualifying responses came after and were contrary to several rounds of detailed instruction on the law, and where the jurors involved seem not to have even recognized the inconsistent nature of their responses, there should be no question about exclusion for cause.

C. *CONCLUSION*

Mr. Brown respectfully requests that the Court reconsider its ruling regarding venire members McKennan and Drake, and excuse both jurors for cause.

Respectfully submitted,

/s/ Terry L. Mulligan

TERRY L. MULLIGAN, WSBA #16076

/s/

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[4] By separate motion and memorandum, Mr. Brown has asked that this Court reconsider its ruling releasing for cause venire member Kristin Ann Henderson, who indicated a strong antipathy towards the death penalty but a determination to nonetheless follow the law and fairly consider it if required to do so. Mr. Brown would urge the view that a juror who recognizes that her views may not be entirely consistent with the law's requirements is far more likely to be and more capable of being fair despite those views than is a juror who does not see his or her own bias.

for LIN-MARE HUPP, WSBA #16149

/s/ Kern Cleven

KERN CLEVEN, WSBA #13455

Counsel for Cal C. Brown

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 22, 1993

***

[3]

MORNING SESSION

November 22, 1993

10:00 o'clock a.m.

(The following occurred in the absence of the jury panel)

THE COURT: Thank you. Good morning. Please be seated.

Counsel, we're back on the record. As I indicated in chambers, we've got most of our jurors here. Ms. Mathieu, number 8, had called about 20 minutes ago now and indicated she was just leaving Bellevue, so she should be here later today. The only one who we have not heard from I believe so far is Ms. Harmon who is number 11 in the box.

Counsel, we had some pretrial matters to finish up or matters dealing with the jury to finish up prior to bringing them out?

MR. CLEVEN: I believe so, your Honor. There are a few motions outstanding the State has now filed a response to on Thursday, was served and should have been received by the Court.

THE COURT: Yes.

MR. CLEVEN: The first matter I think logically to take up is the motion regarding member Henderson, a motion to either recall her or strike the panel and begin from scratch in the alternative. It seems

[4]

logical to take that one up first.

As indicated in our memorandum, it's our recollection that Ms. Henderson did not give any responses which disqualified her and that, in fact, her responses were consistent with a great deal of authority from the United States Supreme Court indicating the type of juror who would be and should be permitted to sit and who, in fact, would be error to excuse for cause, even though the juror may have some opinions, negative opinions towards the death penalty.

I don't believe there's a whole lot I can add to our motion, your Honor. We would simply be moving the Court at this time to recall Ms. Henderson or to strike the panel if she's no longer available.

THE COURT: All right. Ms. Fricke, I did receive the State's response to defense motion regarding the jurors, and that included Ms.

Henderson. Is there anything you'd like to add for the record?

MS. FRICKE: Just to emphasize that Ms. Henderson not only held strong opinions against the death penalty, but that through both her answers on the questionnaire as well as her answers during voir dire and her body language, which the State noted on

[5]

the record, it was clear that she could not set those opinions aside and be an impartial juror, so she should be excused for cause and this Court should not reconsider its previous ruling.

THE COURT: Counsel, I looked back on my notes regarding the voir dire that was done of Ms. Henderson and the reasons why she had been excused by the Court, and I am convinced that she was substantially impaired, so the motion to recall Ms. Henderson or for the mistrial and calling for a new panel will be denied.

MR. CLEVEN: Your Honor, for purposes of clarity of the record, is the Court relying on any response Ms. Henderson gave as disqualifying her or is the Court finding that she was willfully misrepresenting herself to the Court in the course of voir dire?

THE COURT: As we indicated before, counsel, it's difficult -- there is not any one particular response from any one of these jurors I think that is definitive for the most part. It's more of a total overall impression from everything that they have said. With Ms. Henderson I guess what was most convincing was the body posture, the things that

were unsaid because of the fact of the way she crossed her

[6]

arms, sat back and what she was telling us at that point in time.

MR. CLEVEN: Your Honor, that would then bring us to the other two jurors, McKennan and Drake. Mr. McKennan we actually have a transcript of. Ms. Drake, I think it's our recollection her voir dire was very much similar to Mr. McKennan's.

We feel that by the logic of the Court's ruling with Ms. Henderson, that Ms. Henderson is excusable because of a body gesture she made that was arguable consistent with the requirement that the burden of proof beyond a reasonable doubt be on the State during the penalty phase and that there be a presumption of life during the penalty phase, we feel that with regard to members McKennan and Drake who openly indicated hostility to the requirements of the law and really indicated no particular predisposition to follow the law, and even after repeated instructions as to the law whenever they were asked open-ended questions about how they would approach the matter, consistently gave responses inconsistent with the requirements of the law, and it was only when they were asked very close, leading questions that they were able to conform their responses to the requirements that the Court will be no doubt laying

[7]

down should there be a penalty phase in this matter.

They won't have counsel and the Court in chambers reminding them with close, leading instructions -- close, leading questions what the Court's instructions are. They had ample instruction from the Court the first day before they filled out the questionnaire and on the day that they came in for their individual voir dire, and both of them managed, nonetheless, to give answers that were inconsistent with the law's requirements.

If member Henderson is excludable, surely these two jurors are excludable for cause, and we would implore the Court to excuse them at this time.

THE COURT: Ms. Fricke?

MS. FRICKE: With respect to Ms. Drake, in her questionnaire and during the questioning she actually said that her views about capital punishment were not all that strong, so as far as the two part consideration that this Court looks at, first of all, does the juror have a strong feeling in favor of the death penalty, and, second of all, can they set that aside, Ms. Drake doesn't even meet that first prong. She said she didn't have a strong feeling about capital punishment.

There was nothing put on the record by the

[8]

defense about her particular body language or her expressing herself in some way other than words. This juror said that she could look at the specific circumstances of the case and consider all of the facts before deciding whether a death penalty is appropriate.

With respect to Mr. McKennan, he did state strong feelings in favor of the death penalty, but on questioning by counsel and the Court, it was clear that he could consider all circumstances and all facts presented to him and that he would not automatically vote for a death sentence, so we ask the Court to deny reconsideration and to excuse both of these jurors for cause.

THE COURT: Anything further, counsel?

MR. CLEVEN: The State has just asked the Court to excuse both jurors for cause and we go along with that.

MS. FRICKE: I'm sorry, deny their challenge for cause.

THE COURT: I heard that too.

MS. FRICKE: That's what I thought I said.

THE COURT: Counsel, in looking back at my notes, while I think both Mr. McKennan and Ms. Drake did indicate at some point in time in response to a

[9]

question by counsel for the defense about their feelings about the death penalty or the death sentence being the only potential sentence for this kind of crime, in looking at everything that they said over the period of time that they were being questioned by both sides, I think it was obvious that they both indicated they could be fair and open-minded about possible punishments, both life without parole or the death sentence.

While they gave answers that were obviously equivocal at times, I think they both indicated that they could set whatever specific feelings that they had aside and base the decision that they are making on the specific facts that were presented to them at trial, either in the guilt phase or in the penalty phase.

The motions to reconsider the rulings against both Ms. Drake and Mr. McKennan will be denied.

MR. CLEVEN: I'd point out again, your Honor, that it's entirely inconsistent with the Court's treatment of Ms. Henderson. She also indicated that she could set aside her feelings. There seem to be two standards here being applied, and we object in that regard.

THE COURT: Your objection will be noted.

***

FILED

94 MAR 7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

[Caption Omitted In Printing]

EXCERPTS OF VERBATIM REPORT OF PROCEEDINGS

NOVEMBER 29, 1993

***

[93]

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You're free to go to lunch on your own. Be back here at 1:25 for further instructions.

(The following occurred in the absence of the jury)

MR. MATTHEWS: Your Honor, we would like to put one thing on the record real quickly. I note the Court covered it, but we did have two challenges left at the end that we did not use.

***

KING COUNTY SUPERIOR COURT

Date: OCT 25 1993 Page 1 of 1

[Caption Omitted In Printing]

***

Minute Entry

4.0-JYP		
	Trail – Aggravated Murder 1°	
9:00-3:00	Jury Voir Dire Commences.	
	Continued to 10-26-93, 9:00 a.m.	Sub #
		151B

KING COUNTY SUPERIOR COURT

Date: OCT 26 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from Oct 25, 1993

Minute Entry

2.5

(2.75JYP) | Def. And Respective Counsel Present
| Juror Voir Dire Continues
| Jurors Absent

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| Continued To 10-27-93. 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: OCT 27 1993 Page 1 of 2

[Caption Omitted In Printing]

Continued from 10-26-93

Minute Entry

JYP 5.0

| Def. And Respective Counsel Present.
| Prospective Jurors Present
| Voir Dire Continues

***

→ | Richard Crumley

| State Addresses The Court Regarding
| Procedure In Voir Dire
| Individual Voir Dire To Limited Inquiry
| Regarding Death Penalty Phase:
| 1. Larrie Jo Aalvik

| Counsel And The Court Discuss
| Introduction Of Case To Prospective Jurors

| Individual Voir Dire Continues:

| 2. Gary Anderson

Minute Entry

DEPT 12

| 3. Daniel Baer

| 4. Helen Batten

| 5. Sharon Bohinski

|

| Court's Inquiry Of Ms. Bohinski

| Defense Inquiry Of Ms. Bohinski

|

| Court Excuses Ms. Bohinski For Cause

|

| Individual Voir Dire Continues:

|

| 6. Cecil Braeden

|

| Scheduling Discussion And Discussion On

| Mitigation Questions Objection.

|

|

|

| Continued To 10/28/93 At 0900

|

| Court Adjourns

KING COUNTY SUPERIOR COURT

Date: OCT 28 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from OCT 27, 1993

Minute Entry

JYP 4.75

| Def. And Respective Counsel Present.

| Jurors Absent

| Respective Counsel And The Court

| Discuss Voir Dire.

| Jurors Present

| Voir Dire Continues (Individually)

| William Sutherland – State's Challenge.

| Grant

| Mary C. Rivoire – No Challenge

| Chester Paul – Def's Challenge Denied

| Mariquita Clark – No Challenge

| James Estes – No Challenge

| Karen Erickson – Excused

| Laura Faulkner – No Challenge

| William Van Winkle – Excused

| Linda Dingledy – Excused

|

| Continued To 11-1-93, 9:00

KING COUNTY SUPERIOR COURT

Date: NOV 1 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from OCT. 29, 1993

Minute Entry

JYP 5.75

| Def. And Respective Counsel Present.

|

| Voir Dire Continues Individually:

| Willis Kroetsching – Def's Challenge.

| Granted.

| Robert Reimer – No Challenge

| Wheeler Osborn – Def.'S Challenge.

| Granted

| David B. Peace – No Challenge

| Gregory M. Fox – No Challenge

| Tommy Corder – No Challenge

| Paul Jorgensen – Def's Challenge.

| Granted.

| Grace Mickelson – Def's Challenge.

| Granted

| Harold F. Fisher – Excused

| Michael W. Lovell – Def's Challenge.

| Granted

| Victor Obeso – State's Challenge. Denied

	Betsy A. Mathieu – No Challenge
	Continued To 11-2-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 2 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 1, 1993

Minute Entry

JYP – 5.0

***

| Voir Dire Continues Individually

| Ann L. Wallis-Fetterman - Excused

| Jeanette Marr – State's Challenge.

| Denied.

| Shirley Yost – No Challenge

| John Hamakami –No Challenge

| Patricia A. Harmon – No Challenge

| Kelsang Tsatultsang –Excused

| William Ring – No Challenge

| Robert E. Mckennan – Def's Challenge.

| Denied

| Dana G. Montgomery – No Challenge

| Pamela J. McDaniel – No Challenge

| Donald E. Siskar – No Challenge

***

| Continued To 11-3-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 3 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 2, 1993

Minute Entry

5.0 – JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually.
| Jeremy Eisenman – Def's Challenge.
| Granted.
| Barbara Lawrence – No Challenge.
| Cindy S. Sullivan – No Challenge
| Gordon Mccaffrey – No Challenge
| Kristin A. Henderson – State's
| Challenge. Granted
| Emerson R. Cheever – Def's Challenge.
| Denied.
| Marilyn M. Finnila – No Challenge
| Martin C. Peterson – No Challenge
| Marjorie H. Fisk – No Challenge
| Anne B. Forman –No Challenge
| Richard D. Deal – State's Challenge.
| Granted
| Tony Ono – No Challenge
|

Continued To 11-4-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 4 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 3, 1993

Minute Entry

JYP 5.0

| Def. And Respective Counsel Present.
| Voir Dire Continues Individually
| Joseph C. Pabillon – Excused
| John Reynozo – State's Challenge.
| Granted.
| Donna E. Lundquist – Excused
| Kim R. Ybarra –Def's Challenge. Denied.
| Lisa M. Denis – State's Challenge.
| Granted.
| Edwin E. Dorothy – No Challenge
| Roxanne M. Hadfield – No Challenge
| Brian E. Holly – No Challenge
| Joan A. Kimball – No Challenge
| Doris I. Nelson – Excused
| Jeffrey S. Phillips – No Challenge
| Irene R. Kirschnick – Def's Challenge.
| Denied
|
| Continued To 11-5-93, 8:30 a.m.
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 5 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 4, 1993

Minute Entry

JYP 2.25

| Def. And Respective Counsel Present.

| Voir Dire Continues Individually

| Jon C. Miner –Def's Challenge. Denied.

| Maggie M. Nowakowska – No Challenge

| Phillip J. Herrera – No Challenge

| William J. Robbins – Def's Challenge.

| Denied.

|

| Continued To 11-8-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 8, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 5, 1993

Minute Entry

5.5 JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually
| Paul Chambers – Excused
| Phillip W. Hagen – Excused
| Nancy Shortt – No Challenge
| Althea Noel – State's Challenge. Denied
| Morgan Hausrath – No Challenge
| Bradford K. Chinn – No Challenge
| Steve P. Schiller–No Challenge
| Mildred R. Crocket – Excused
| Jane Peter – No Challenge
| Donna Drake – Def's Challenge. Denied.
| Brian Kosai – Def's Challenge. Denied.
| Christopher M. Schmidt – Def's
| Challenge. Granted.
|
| Continued To 11-9-93, 9:00 a.m.
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 9, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 8, 1993

Minute Entry

4.25 JYP

| Def. And Respective Counsel Present
| Voir Dire Continues Individually
| Robert S. Parker. State's Challenge.
| Denied.
| Sandra L. Sperry. No Challenge
| William A. Darlington. No Challenge
| Charlotte Welch. No Challenge
| Michael D. Dykeman. No Challenge
| James J. Kullberg. Excused
| Roger Croisier. No Challenge
| Angelika A. Hayden. No Challenge
| Mary M. Perkins. State's Challenge.
| Granted
| Continued To 11-10-93, 9:00 a.m.
|
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 10 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 9, 1993

Minute Entry

JYP 4.5

TTIME .75 | Def. And Respective Counsel Present.
| Voir Dire Continues Individually
| John T. Holland. Def's Challenge.
| Denied.
| Deborah L. Hubbard. No Challenge
| Brenda D. Vasser. Def's Challenge.
| Granted
| Judy A. Riley. No Challenge
| Susan G. Hulsey. Pltf's Challenge.
| Denied
| Marc T. Glaser. Def's Challenge.
| Granted
| Mark E. Hergert. Excused
| Discussion Of Transcrit Of Confession.
|
| Continued To 11-15-93, 9:00 a.m.
|
|
|

KING COUNTY SUPERIOR COURT

Date: NOV 22 1993 Page 1 of 2

[Caption Omitted In Printing]

Continued from NOV 16 1993

Minute Entry

JYP 5.5

| Def. And Respective Counsel Present.
| Jurors Absent (Juryroom).
|
| Def. Motion To Recall Henderson Or
| Strike Panel.
| Respective Counsel Make Argument
| Court Ruling: Motion Denied.
|
| Def. Motion To Reconsider McKennan
| And Drake And Have Them Dismissed
| For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion DENIED; Def.
| Objection Noted.
|
| Discussion Between Court And Counsel
| Re; Scheduling.
|
| Prospective Jurors Present.
| Voir Dire Continues.

| Prospective Jurors Absent (Juryroom).

|

| State Objection To Def. Use Of The Word "Torture" When Questioning Prospective Jurors.

| Def. Objection To Restriction Being Put On Questioning Of Prospective Jurors.

| Court Ruling: Counsel Will Stay Within Perameters Of The Court.

Minute Entry

| Prospective Jurors Present.
| Voir Dire Continues.
|
| All Prospective Jurors Excused At 2:40 pm
| Until November 23, 1993 At 9:00 am
| Except Hamakami,Harmon, Sullivan,
| McKennan And Montgomery.
|
| Prospective Juror Sulllivan Excused Until
| 9:00 am On November 23, 1993.
|
| Def. Motion To Have Prospective Juror
| McKennan Excused For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion GRANTED.
|
| State Motion To Have Prospective Juror
| Hamakami Excused For Cause.
| Respective Counsel Make Argument.
| Court Ruling: Motion GRANTED.
|
| Prospective Juror Harmon Excused Until

| 9:00 am On November 23, 1993.

| Joint Motion To Have Prospective Jurors
| Fox And Montgomery Excused For Cause.
| Court Ruling: Motion GRANTED.

| Cause Continued To November 23, 1993
| At 9:00 am.

KING COUNTY SUPERIOR COURT

Date: NOV 23, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV 22, 1993

Minute Entry

JYP-4.5

Def. And Respective Counsel Present.

Voir Dire Continues

Continued To 11-24-93, 9:00 a.m.

KING COUNTY SUPERIOR COURT

Date: NOV 24, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from NOV. 23, 1993

Minute Entry

JYP 2.75

Def. And Respective Counsel Present.

Voir Dire Continues.

Continued To Nov 29, 1993

KING COUNTY SUPERIOR COURT

Date: November 29, 1993 Page 1 of 1

[Caption Omitted In Printing]

Continued from November 24, 1993

Minute Entry

JYP-3.0

TTIME – 2.0

| Def. And Respective Counsel Present

| Voir Dire Continues.

| Jurors Sworn And Impaneled To Try This Cause:

| Phillip Herrera Charlotte Welch (3rd Alt.)

| William Robbins Michael Dykeman

| Robert Reimer (2nd Alt.) Patricia Harmon (4thAlt.)

| David Peace (1st Alt.) Bradford Chinn

| Roger Croisier Sandra Sperry

| Tommy Corder Angelika Hayden

| Edwin Dorothy Tony Ono

| Betsy Mathieu Maggie Nowakowska

| The Court Makes Preliminary Remarks To The Jury.

| Jury Absent

***

FILED

DEC 22 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)
Plaintiff,	) NO. 91-1-03233-1
v.	)
CAL COBURN BROWN,	)
Defendant.	)

COURT'S INSTRUCTIONS TO THE JURY

SENTENCING PHASE

December 22, 1993

/s/ Ricardo S. Martinez

JUDGE RICARDO S. MARTINEZ

NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of testimony of the witnesses and the exhibits admitted into evidence in phase one of this trial and during this special sentencing hearing. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the

witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or the law given to you by the court.

The lawyers have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight, effect or believability of the testimony of a witness or of other evidence. If it appears to you that I have so commented, during either the trial of the giving of these instructions, you must disregard such comment entirely.

NO. 2

Jurors should consult with one another during deliberation. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

NO. 3

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, and the sources of the witness's information, together with the factors already given you for evaluating the testimony of any other witness.

NO. 4

A defendant is not required to testify. The fact that Mr. Brown has not personally addressed you cannot be used to support a finding that the State has met its burden on the question posed by these instructions. Mr. Brown's silence during this sentencing proceeding should not prejudice him in any way.

NO. 5

During this sentencing phase proceeding, the State has the burden of proving to you beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. If the State meets this burden, the death penalty will be imposed.

Mr. Brown has no burden. He is not required to prove the existence of any mitigating circumstance or circumstances.

Mr. Brown is presumed to merit leniency, which would result in a sentence of life in prison without possibility of release or parole. This presumption continues throughout the entire proceeding unless, during your deliberations, you find unanimously that it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is a doubt for which a reason can be given, and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence.

NO. 6

The question you are required to answer is as follows: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

If you unanimously answer "yes," the sentence will be death.

On the other hand, if any one or more of you does not answer "Yes," or if you unanimously answer "No," the sentence will be life imprisonment without possibility of release or parole.

NO. 7

A mitigating circumstances is a fact about either the offense or about the defendant which is fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense.

The appropriateness of the exercise of mercy is itself a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

You are also to consider as mitigating circumstances any other factors concerning the offense or the defendant that you find to be relevant, including, but not limited to, the following:

Whether the murder was committed while the defendant was under the influence of extreme mental disturbance; or

Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect.

NO. 8

Life imprisonment without the possibility of release or parole means that:

(1) The individual shall not have his sentence suspended, deferred or commuted by any judicial officer;

(2) The Indeterminate Sentencing Review Board or its successor shall never parole the individual or reduce the period of confinement;

(3) The person shall not be released as a result of any type of good time calculation; and

(4) The Department of Corrections, or any executive official, shall not permit the person to participate in any release or furlough program.

NO. 9

Because you have found the defendant, Cal Coburn Brown, guilty of aggravated first degree murder, you have been reconvened for this special sentencing proceeding.

It is the foreperson's duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon the question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and the sentencing verdict form.

You must answer one question. All twelve of you must agree before you answer the question "yes". If all twelve of you have so agreed, fill in the answer to the question in the verdict form to express your decision.

On the other hand, if any one or more of you does not answer "yes," or if you unanimously answer "no," fill in the answer to the question in the appropriate place on the verdict form. When you have filled in the answer called for by the verdict form, the foreperson will sign it and notify the bailiff who will conduct you into court to declare your verdict.

/s/Judge Ricardo S. Martinez Dec 22, 1993

FILED

DEC 27 1993

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	NO. 91-1-03233-1
v.	)	VERDICT FORM
CAL COBURN BROWN,	)	
Defendant.	)	

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

ANSWER: [YES] "Yes" (in which case the defendant shall be sentenced to death).

[___] "Unable to Unanimously Agree" (in which case the defendant shall be sentenced to life imprisonment without possibility of parole).

[___] "No" (in which case the defendant shall be sentenced to life imprisonment without possibility of parole).

/s/ _____

FOREPERSON

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	
v.	)	No. 91-1-03233-1
CAL COBURN BROWN,	)	JUDGMENT AND SENTENCE
Defendant.	)	

THIS MATTER having come on regularly for sentencing on the 28th day of January, 1994, the defendant being present with his attorneys, Terry Mulligan, Kern Cleven and Lin-Marie Hupp; the State being represented by Alfred W. Mathews and Theresa Fricke, Senior Deputy Prosecuting Attorneys for King County, Washington, and the defendant having previously been convicted at jury trial of the crime of Premeditated Murder in the First Degree with Aggravating Circumstances, contrary to RCW 9A.32.030(1)(a), RCW 10.95.020(7), RCW 10.95.020(9)(a)(b)(d); Premeditated Murder in the First Degree contrary to RCW 9A.32.030(1)(a), and the lesser included crime of Murder in the First Degree (Felony), committed by alternative means contrary to RCW 9A.32.030(1)(c)(1), (1)(c)(2), (1)(c)(5), as charged in the Information filed on 11 June 1991, and the court having afforded counsel the right to speak, and the defendant having been afforded the opportunity to make a statement in mitigation of punishment to the jury empaneled herein in the penalty portion of the trial, and the defendant also having been given the opportunity to allocate to the jury empaneled in the penalty portion of the trial, and the jury having thereafter

unanimously answered in the affirmative the following question pursuant to RCW 10.95.060(4):

> Having in mind the crime of which the defendant has been found guilty are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

And the defendant having been afforded the opportunity to make a statement in mitigation of punishment to the court,

NOW, THEREFORE, THE COURT ORDERS, ADJUDGES AND DECREES:

1. The defendant is guilty of the above-listed crimes.

2. Pursuant to RCW 10.95.080(1), on the conviction for Premeditated Murder in the First Degree with Aggravating Circumstances, the defendant shall be, and hereby is sentenced to death.

3. On this date the defendant was advised of his appellate rights and of the time limitations on collateral attack contained in RCW 10.73.090.

4. The court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA identification analysis. RCW 43.43.754.

5. The defendant is hereby remanded to the custody of the King County Sheriff for detention in the King County Jail until delivered into the custody of officers of the State of Washington, Department of Corrections, for confinement in the

Washington State Penitentiary at Walla Walla, Washington.

6. The defendant shall be transported and imprisoned in the Washington State Penitentiary at Walla Walla forthwith, but in no event later than ten (10) days from the entry of this Order pursuant to RCW 10.95.170.

DONE IN OPEN COURT this 28 day of January, 1994.

/s/ Ricardo S. Martinez

JUDGE RICARDO S. MARTINEZ

Presented by:

NORM MALENG

King County Prosecuting Attorney

By: /s/ Alfred W. Mathews
ALFRED W. MATHEWS, WSBA ID #9350

By: /s/ Theresa Fricke
THERESA FRICKE, WSBA #16549

Senior Deputy Prosecuting Attorney

Attorneys for Plaintiff

Office WSBA ID #91002

Copy received; approved as to form;

~~Notice of presentation waived~~: kc

By: Terry Mulligan
Terry Mulligan, WSBA #16076
Attorney for Defendant

By/s/ Kern Cleven
KERN CLEVEN
Attorney for Defendant

/s/ Lin-Marie Hupp
LIN-MARIE HUPP 16149

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[Fingerprints, Attestation, And Certificate Omitted
In Printing

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CHAPTER 153–HABEAS CORPUS

→ § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of

the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a

factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Wash. Rev. Code 10.95.020

Definition.

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

Wash. Rev. Code 10.95.030

Sentences for aggravated first degree murder.

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purposse of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

Wash. Rev. Code 10.95.060

Special sentencing proceeding – Jury instructions – Opening statements – Evidence - - Arguments – Question for jury.

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands

convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

Wash. Rev. Code 10.95.080

When sentence to death or sentence to life imprisonment shall be imposed.

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050 (2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).